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AMERICAN BAR ASSOCIATION JOVRNAL

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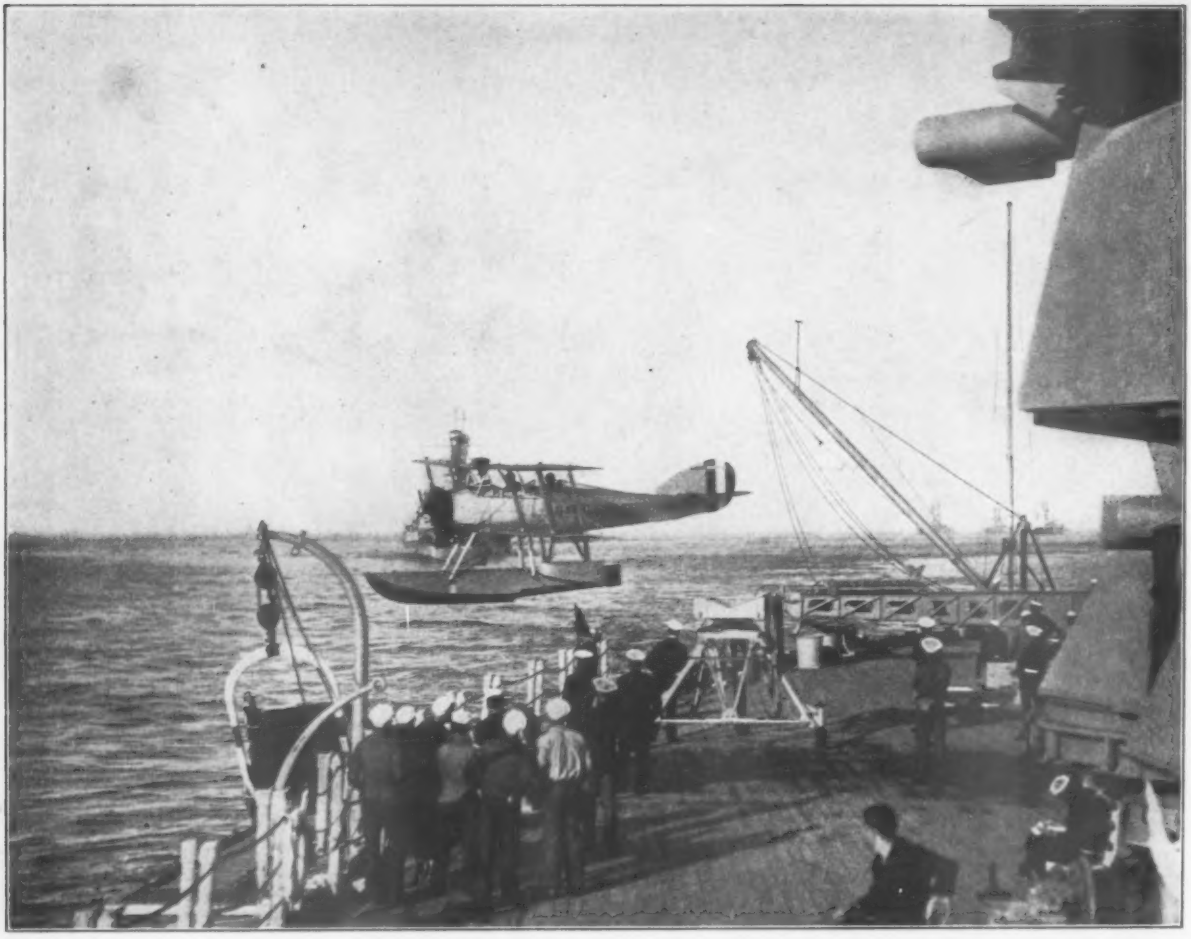

Catapulted INTO FULL FLIGHT

An authority on aviation, a man who has had an important part in the development of both the air-cooled engine and the variable propeller, predicts that another big advance in aviation will come when planes are catapulted from the ground into the air.

Catapulting planes from ships is now commonplace. Pilots prefer this form of "take-off." It is safer.

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The instructors are men of experience in insurance, in selling and in teaching.

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AMERICAN BAR ASSOCIATION
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CURRENT EVENTS

Ashurst Bill Approved by Committee of Association of the Bar

"THE Bill is a meritorious measure," concludes the Report of the Committee on Federal Legislation of the Association of the Bar of the City of New York on the pending Ashurst Bill (S. 3212) to "establish the Administrative Office of the United States Courts and for other purposes." "It not only furnishes new machinery and offers fresh encouragement for the more efficient operation of the judicial branch of the National Government but it also gives new support for the independence appropriate to that branch. Subject to the reservation and suggestions made above, we approve its purpose, scope and contents."

These reservations and suggestions are set forth at the end of the report, after an examination of the general features of the proposed measure. They are as follows:

"As indicated above, the creation of the new agency here in question seems justified. Undoubtedly, too, that agency can be used as a means of strengthening the work of the judicial conference. But we are not satisfied, on the face of the Bill in its present form, that the relationship between the administrative office and the judicial conference is adequately worked out and stated.

"For one thing, the Bill takes no note (with an exception presently to be mentioned) of the judicial conference or of the Act of September 14th, 1922, under which the conference operates. This exception is the provision which declares that the Director shall be 'under the supervision of the Chief Justice of the United States *and of the conference of senior circuit judges.*' Aside from possible difficulties flowing from a double supervisor, doubts may arise as to the feasibility of such supervision by a conference which meets but once a year and then only for a short period.

"Furthermore, the Bill does not remove the risk of duplication and confusion. This is apparent from the fact that the Act of 1922 will continue unamended, with its provisions *inter alia*:

"1. That the senior district judge of each United States district court shall submit a report annually 'setting forth the condition of business in said district court, . . . together with recommendations as to the need of additional judicial assistance for the disposal of business for the year ensuing;'

"2. That the senior circuit judge shall 'advise as to the needs of his circuit and as to any matters in respect of which the administration of justice in the courts of the United States may be improved;'

"3. That the conference 'shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment and transfer of judges . . . . and shall submit such suggestions to the various courts as may seem in the interest of uniformity and expedition of business.'

"We think the Bill needs clarification in regard to its relationship with and effect upon the prior law relating to the judicial conference. Perhaps the two measures could be consolidated so as to produce a general enactment covering both the judicial conference and the administrative office. In any event, no final action should be taken without inviting the views of the Chief Justice and of the judicial conference on the workability of this part of the Bill."

The report of the Committee is signed by Cloyd Laporte, Chairman; Samuel Blumberg, Arthur H. Dean, Noel T. Dowling, Hersey Egginton, Morris Hadley, Milton Handler, Paul D. Miller, Robert G. Page, Simon H. Rifkind, W. R. Abbot Southall, John E. F. Wood.

Next Meeting of Special Committee on Law Lists

The next meeting of the Special Committee on Law Lists will be held at the Hotel Mayflower, Washington, D. C. on May 10 and 11. The committee has under investigation and consideration applications for approval of a number of law lists and public announcement of those approved under the Rules and Standards adopted by the Association will be made well in advance of July 1, 1938, the effective date of such Rules and Standards.

While representation of these lists at this meeting is not required, the committee will welcome suggestions pertinent to the administration of the Rules and Standards from them or any one interested, either in person, by group representation, or by letter, at this meeting or at any other convenient time.

Address communications to Martin J. Teigan, Secretary to the Special Committee on Law Lists, 209 South LaSalle Street, Chicago, Illinois.

Rapid Strides for Procedural Reform in Pennsylvania

AT the last session of the Pennsylvania Legislature an Act was adopted which, although little publicized, has opened the way to procedural reform of the utmost importance for the courts of the Commonwealth, and has placed the State in the vanguard of American jurisdictions in this regard. The Act of June 21, 1937 (Pamphlet Laws 1982) had two principal purposes: (1) to bestow upon the Supreme Court of Pennsylvania sweeping rule-making powers over all civil courts of record, and (2) to expedite the disposition of judicial business by empowering the Supreme Court to propound rules to accomplish this end.

Under Section 1 the Supreme Court is authorized to prescribe by general rule the forms of actions, process, writs, pleadings and motions, and the practice and procedure in civil actions at law and in equity, with the limitation that rules may not be adopted inconsistent with the Constitution or affecting the substantive rights of litigants and the jurisdiction of the several courts. The section does not apply to criminal procedure or procedure in the Orphans' Courts which are entrusted with jurisdiction over decedent's estates. Not the least important of the provisions in this section is that which provides for the

suspension of any procedural enactment of the legislature which conflicts with the general rules promulgated by the Court.

The right of the individual courts to adopt local rules not inconsistent with the uniform rules thus prescribed, is preserved in Section 2.

Section 3 authorizes the appointment by the Supreme Court of a Procedural Rules Committee, composed of members of its Bar, whose function is administrative and advisory in the revision and preparation of general rules.

Section 4 empowers the Supreme Court to provide for the punishment of any failure on the part of the trial courts and their officers to furnish the Court and its Committee with such information as it shall require for the purpose of its work.

The second division of the Act, contained in Section 5, enables the Supreme Court to adopt rules for the expediting of the business of all courts of record. This section is a departure in judicial reform and has already borne fruit.

The Act brings to a satisfactory conclusion the long, undeclared conflict between the legislative and judiciary. The legislature has, by its magnanimous action, restored to the courts their traditional and proper power over rules of judicial procedure, without which the functioning of the judiciary as a separate branch of government is immeasurably impaired. The withdrawal of the legislature from this exclusively judicial sphere of control has long been advocated by eminent legal authorities. The American Bar Association successfully sponsored such a measure for the Federal Courts, which was adopted by Congress in 1934 (Act of June 19, 1934, c. 651, section 1, 48 Stat. at L. 1064).

The lodging of supreme rule-making authority in the highest appellate tribunal of the State, actively directing and supervising the work of its Committee, is especially to be commended. The courts of King's Bench and the High Court of Chancery of England, from which the Pennsylvania Supreme Court derives its powers, always enjoyed the prerogative of making general rules of procedure for the courts of nisi prius. The Supreme Court of the United States was recognized to possess this power as early as 1792.

The heavy judicial burden which is borne by the appellate tribunal was recognized by the legislature in creating the committee of attorneys to be entrusted with the elaborate details of analysis and revision, but the law wisely vests in the highest court of the State the sole responsibility for procedural reform and places the seal of its authority and dignity upon the efforts of the Committee.

When the welter and confusion of conflicting rules of civil practice which now prevails throughout the sixty-seven counties of the State is considered, with the resultant embarrassment and hardship to attorneys and litigants, the value of the opportunity afforded for uniformity of practice can be readily appreciated.

The Pennsylvania Procedural Rules Committee was appointed within one month of the adoption of the Act and for more than eight months its members have conducted a comprehensive and exhaustive examination of all the county rules of court. With the cooperation of these courts and their officers there has been compiled for the first time an accurate table of comparative rules. The result of its studies will soon take form in concrete recommendations to the Supreme Court for uniform procedure, and, from time to time, the Committee will assist the Court by submitting recommendations for further changes. Many of the Committee are distinguished members of the State and National bar associations. Honorable Robert von Moschzisker, former Chief Justice of the Supreme Court of Pennsylvania, is Chairman, and the other members are: Dr. Herbert F. Goodrich, Vice-Chairman; Hon. Charles A. Waters, Prothonotary of the Supreme Court, Treasurer; Albert Smith Faught, Esq., Secretary; Philip Werner Amram, Esq.; John G. Buchanan, Esq.; Edward J. Fox, Jr., Esq.; George Ross Hull, Esq.; F. Lyman Windolph, Esq.; Seth T. McCormick, Jr., Esq.; Andrew Hourigan, Esq.; Francis B. Quinn, Esq.; Franklin L. Wright, Esq.; P. J. Little, Esq.; John H. Fertig, Esq., and H. Eastman Hackney, Esq.

Immediate results under Section 5 of the Act have been obtained, as the recent report of Mr. Chief Justice John W. Kephart to his Associate Justices of the Supreme Court of Pennsylvania, Justices William I. Schaffer, George W. Maxey, James B. Drew, William B. Linn, Horace Stern and H. Edgar Barnes, indicates. Acting under Section 5 of the Act, the Supreme Court, which itself boasts a remarkable record of many years standing for the prompt disposition of its cases, immediately instituted a survey of unfinished civil business in the lower courts. This survey created a precedent in judicial procedure for this State, and perhaps any other State. At its inception it was found there were approximately 300 cases of that description on the dockets of the local courts. Steps were taken instantly to reduce this number, and, on November 10, 1937, Chief Justice Kephart made his first report to the Court that there were 143 civil cases on the dockets of the lower tribunals which had remained undisposed of for more than six months. Several of these cases were more than one year old, and one had attained the hoary age of six and a half years. This report received wide attention and resulted in real efforts on the part of the courts to dispose of their delayed cases. The success of these efforts and the remarkable efficacy of the supervision made possible by the new Act are attested by the following excerpts from the second report of the Chief Justice issued on February 3, 1938, three months after the first. Chief Justice Kephart stated:

"The first report showed one hundred forty-three cases over six months old and undecided by the courts. It pleases me very much to report that in every county of this Commonwealth with the exception of one . . . the judges have brought their work up to a point where they have under consideration only current cases. This is a most remarkable record, and as far as we know unsurpassed by any State in the Nation. . . .

"In this connection it may now be reported that real progress has been made towards placing in operation effective rules which will regulate the work of the several courts of record of the Commonwealth, and among other things will insure speedy disposition of cases, thereby eliminating needless expense to litigants and at the same time rendering the practice of law far more satisfactory to the members of the bar.

"This work is being conducted by the Procedural Rules Committee, appointed by this Court, which has been at work since July of last year, effecting a complete and thorough revision of the rules of Court of the several courts of record of the Commonwealth.

"A rule requiring the reporting of undisposed of civil cases has been drafted and will shortly be submitted to you for approval and promulgation."

This report marks the beginning of a new period in the work of the Pennsylvania courts and holds out to litigants the promise of speedy civil adjudication. The Act of 1937 and the work of the Supreme Court and its Committee have oiled the wheels of justice in the Commonwealth of Pennsylvania.

GEORGE M. NEIL.

Public Meeting of Committee on Federal Taxation

THE Standing Committee on Federal Taxation held its Sixth Tax Clinic in two sessions at the Hotel Willard in Washington on Saturday, February 26, 1938. The initial luncheon session was attended by about two hundred thirty lawyers, a large number of whom stayed for the afternoon discussions.

Roger J. Traynor, Professor of Taxation at the University of California and at present Consulting Expert, United States Treasury Department, spoke at the luncheon session on "Declaratory Rulings." Brief remarks were also made by Roswell Magill, Under Secretary of the Treasury, Wesley E. Disney, member of the Ways and Means Committee of the House of Representatives, and John P. Wenchel, Chief Counsel for the Bureau of Internal Revenue.

Other guests of the Committee seated at the speakers' table included Commissioner C. Frasier Elliott, in charge of income tax administration for the Dominion of Canada; Associate Justice Justin Miller of the United States Court of Appeals for the District of Columbia; Judge William R. Green of the United States Court of Claims; Judge Benjamin H. Littleton of the Court of Claims; Chairman C. Rogers Arundell of the United States Board of Tax Appeals; Assistant Attorney General James W. Morris; Arthur H. Kent, Assistant General Counsel of the Treasury Department; Milton E. Carter, Assistant to the Commissioner of Internal Revenue; Eldon P. King, Special Deputy Commissioner of Internal Revenue; George Maurice Morris, Chairman of the House of Delegates of the American Bar Association; Miss Annabel Matthews, President of the Women's Bar Association of the District of Columbia; Horace Russell, President of the Federal Bar Association; and Harold D. Greeley, member and secretary of the Taxation Committee of the Association of the Bar of the City of New York.

The program also included open forum discussion on the following topics:

A. Does the public interest require that the text of our income tax law be as complicated as it is at present?

Opening Statements:

Jacob Mertens, Jr., co-author of Paul & Mertens on "Law of Federal Income Taxation."

E. Barrett Prettyman, former General Counsel, Bureau of Internal Revenue.

B. Does the Government profit by the legislative policy of limiting deductions for capital losses without putting corresponding limitations on the taxing of capital gains?

Opening Statement: Mabel Walker Willebrandt, former Assistant Attorney General.

C. Dealings between taxation officials and taxpayers: How may they be made more effective for prompt disposal of controversies?

Opening Statement: Extracts reported by J. Warren Brock, Philadelphia, from answers to questionnaires issued to trust officers and others who deal with tax officials.

D. The currently proposed revision of the revenue laws.

Comment from the floor.

E. Other taxation topics within the scope of the committee.

Speakers from the floor included Judge William R. Green of the Court of Claims; Granger Hansell of Atlanta, Georgia; Harold D. Greeley and Lyle Alverson of New York; Frederick Schwertner of Washington, A. S. Dayton of Charleston, West Virginia, and Commissioner Elliott of Canada.

American Law Institute Council Holds Mid-Winter Meeting

AT its mid-winter meeting this year the Council of the American Law Institute had before it the largest volume of material ever before it for consideration at one time. The session lasted from February 22 through February 26, and was held at the headquarters of the Bar Association of the City of New York. About 886 printed pages of restatement and statutory material were considered by the Council members in addition to the usual routine of reports and matters of Institute business.

Obviously all of this material could not be discussed in detail had the session lasted four weeks instead of one. But complete detailed discussion was unnecessary. Much of the law in any field is fairly well settled. Where that is the case, the task of those writing a restatement is to make the arrangement of material orderly and the statements clear. The critical testing of success in this respect is best done by individual reading and comment, not group discussion. Points of confusion, of division of authority in the cases, problems of policy in statute drafting may then be taken up in meeting, and to such discussion the week's meeting was devoted.

Four Statutes Considered

Four statutes were under consideration, each a product of cooperative work between the American Law Institute and the National Conference of Commissioners on Uniform State Laws. Two concerned property problems. One of these, called the "Property Act," is to "assimilate interests in real and personal property to each other, to simplify their creation and transfer, and to protect the owners of present and future interests." Its reporter is A. James Casner, of the University of Illinois. This statute was considered by the Institute in a prior draft at its 1937 meeting; also by the Conference of Commissioners last fall. As amended, it was directed to be presented again for consideration at the Institute meeting this year as a proposed final draft.

The second Property statute is called a "Perpetuities Act." It was drawn by Lewis M. Simes, of the University of Michigan, as reporter, and is described as "an act concerning perpetuities and restricting the creation and duration of future interests, powers of appointment, indestructible trusts and honorary trusts." This was the first appearance

of this statute and while it was sent on for consideration at the annual meeting, it will be discussed by the Conference of Commissioners as well as the Institute before any final action is asked for concerning it.

Another statute appearing for the first time was a proposed tentative draft of a "contribution among tortfeasors" statute, drawn by Charles O. Gregory, of the University of Chicago, as reporter. This statute should provoke interesting discussion at the annual meeting for it covers a field where the growth of the common law was slow and arbitrary. The final statute was the new draft on the "Law of Airflight." It will be remembered that this is part of a general code of the law of aeronautics, the first two parts of which have already been approved by the Conference of Commissioners. The Institute is cooperating with the Conference on the remaining statutes. These were brought before the annual meeting in 1937 by the reporter, Mr. William A. Schnader, of Philadelphia. These statutes, especially those with regard to the liability of an airplane operator, for commercial purposes, provoked sharp differences of opinion, all of which will doubtless find expression at the May meeting.

Further Drafts in Torts and Property

The bulk of the Restatement material was composed of further drafts in the Law of Torts and in the Law of Property. To accelerate the work in these two subjects several groups have been formed in each. In Torts one group submitted a revision of the chapter on domestic relations; another group with Everett Fraser, of the University of Minnesota, as reporter, submitted the first tentative draft of a chapter covering the material called "private nuisance." The third reporter's material was that of Harry Shulman, of Yale University, whose 193 pages of text and notes cover the subject of "interference in business relations by trade practices."

In the field of Property, Oliver Rundell, of the University of Wisconsin, submitted two chapters in the field of "easement and profits." Richard Powell, of Columbia, the general reporter for the subject, submitted three drafts which contain a chapter in the general subject of the creation of remainders or executory devices. W. Barton Leach, of Harvard Law School, reporter for the chapter of "powers of appointment," submitted a revised draft of the material which was before the Institute at its last meeting, together with some additional material in the same field.

The final piece of restatement presented was that in the Law of Security, reported by John Hanna, of Columbia University Law School. This covered material in the field of "pledges."

The date of the annual meeting of the Institute was fixed for this year for May 12, 13 and 14 and the place of the meeting will be, as usual, the Mayflower Hotel, in Washington. The combination of the unusually large bulk of material in the restatement, plus the proposed statutes promises to make the Washington session one of the busiest which the membership of the Institute has ever had. H. F. G.

Washington Letter

Civil Procedure Rules Hearing

THE hearing on the proposed new Federal Rules of Civil Procedure was held before the Judiciary Committee of the House of Representatives. President Arthur T. Vanderbilt of the American Bar Association was one of the witnesses who appeared in support of the rules. He brought out the points that these rules, if permitted to go into effect, will make the courts more efficient and will be an aid to all litigants; and also that they will be easier to understand from a legal point of view.

Very few criticisms of the rules as prepared were voiced at the hearing and such as were made were of a minor character, probably necessitating no changes in the rules. There now are being prepared notes to the rules which, it is believed, will make eminently plain a number of the points as to which questions were raised by a few of the witnesses.

Major Edgar B. Tolman, Secretary of the Advisory Committee on Rules for Civil Procedure, explained fully such of the rules as were the subjects of special inquiries together with the circumstances surrounding their development. Some of the labor representatives, while generally approving the rules, made suggestions as to the serving of process on the officers or members of the executive boards of unincorporated associations. They recommended striking out certain words relating to temporary restraining orders and injunctions; and favored giving the public an opportunity to appear before the Supreme Court to offer objections in the process of developing rules of this nature. Judge Padway was opposed to the method provided for putting the rules into effect.

Others who appeared before the Judiciary Committee were: Attorney General Homer S. Cummings, who made a very helpful statement in favor of the rules; Charles E. Clark, Dean of the Yale Law School, who is a member of and Reporter for the Advisory Committee on the Rules; William D. Mitchell, formerly Solicitor General, and Chairman of the Advisory Committee; George Maurice Morris, Chairman of the House of Delegates of the American Bar Association; Joseph A. Padway, General Counsel for the American Federation of Labor; Merle D. Vincent, Counsel for the International Garment Workers' Union, a C. I. O. affiliate; Herschel W. Arant, Dean of Ohio State University Law School; Robert F. Cogswell, representing the District of Columbia Bar Association; Hall Etter, President of the National Shorthand Reporters' Association; Challen B. Ellis, of the District of Columbia bar; and Representative Harry Sauthoff, of Wisconsin. A letter was received from Lee Pressman, General Counsel for the C. I. O. but he did not appear before the Commitee.

It appears most probable that the rules, as now drafted, will be permitted to go into effect, without change, under the provision of Sec. 2 of the enabling act of June 19, 1934 which states that they shall not take effect until after the close of the session of Congress to which they shall have been reported, at its beginning, by the Attorney General. They were so reported to the present session of the 75th Congress. In order to provide ample time for the rules to become familiar to the bench and the bar before they shall apply, the last rule, No. 86 thus establishes their effective date:

"These rules will take effect on the day which is 3 months subsequent to the adjournment of the second regular session of the 75th Congress, but if that day is prior to September 1, 1938, then these rules will take effect on September 1, 1938. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies."

Solicitor General Jackson

From the office of Assistant Attorney General, Robert H. Jackson was elevated to the position of Solicitor General which Senator Wagner, of New York, said, "is generally regarded

among practicing lawyers as the highest honor which can be conferred upon any advocate with a passion for public service." Mr. Jackson's introduction to an official career in Washington was as General Counsel of the Bureau of Internal Revenue in 1934.

Prior to that time, he had been prominent in the practice in his home state, New York, a part of his public service being as one of the New York State Commissioners to Investigate the Administration of Justice. He has been a member of the American Bar Association since 1923 and was Chairman of the National Conference of Bar Association Delegates for 1933-34.

At 21 years of age, Mr. Jackson was admitted to the bar and began practice at Jamestown, in the extreme western portion of New York. Among his clients were some of the prominent institutions of that city. He married Miss Irene Gerhardt, of Albany, in 1916 and they have two children. Mr. Jackson was born at Spring Creek, Pennsylvania, which is in Warren County, just across the state line from Chautauqua County, New York, where he entered the practice.

HON. ROBERT H. JACKSON, SOLICITOR GENERAL

Basic Facts to Be Stated by Communications Commission

There must be stated, in the findings of the Federal Communications Commission, the basic facts from which the ultimate facts in the terms of the statutory criterion are inferred in cases respecting applications for radio station licenses or permits, says the United States Court of Appeals for the District of Columbia. Tri-State Broadcasting Company v. Federal Communications Commission, No. 6931; and Saginaw Broadcasting Company v. Federal Communications Commission, No. 6990.

The Court held, however, that "It is not necessary for the Commission to recite the evidence, and it is not necessary that it set out its findings in the formal style and manner customary in trial courts. It is enough if the findings be unambiguously stated, whether in narrative or numbered form, so that it appears definitely upon what basic facts the Commission reached the ultimate facts and came to its decision."

In holding the Commission to have committed error in admitting hearsay evidence, the Court recognized that, as an administrative body, the Commission was not limited by all the strict rules of evidence prevailing in courts, but reasoned that "the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended."

In summing up the method by which such a commission reaches its decisions, the Court said that it necessarily includes four parts: "(1) Evidence must be taken and weighed, both as to its accuracy and credibility; (2) from attentive consideration of this evidence a determination of facts of a basic or underlying nature must be reached; (3) from these basic facts the ultimate facts, usually in the language of the statute, are to be inferred, or not, as the case may be; (4) from this finding the decision will follow by the application of the statutory criterion."

Industrial Property Rights

A handbook just issued may be found of interest to those having to do with a number of subjects of growing importance in modern industry and commerce around which are grouped an aggregation of rights sometimes referred to as "industrial property."

While especially useful to the industrial property specialist, the book is more in the form of a businessman's guide on such subjects as: piracy, designs, labeling, royalties, trade-marks, unfair competition, combines restraining trade, patents, goodwill, copyright, advertising, commercial names, transfer and license, false indication of origin, and other similar topics.

This book is put out by the Department of Commerce, Bureau of Foreign and Domestic Commerce, and was prepared by Mr. James L. Brown of the Division of Commercial Laws. It represents many years of active experience and specialized study in this field. It contains a summary of the trade-mark laws of 63 foreign countries and an explanation of the text of the principal international conventions dealing with the subjects mentioned. This publication is available, at a charge of 20c, from the Superintendent of Documents, Government Printing Office, Washington, D. C. It has 184 pages, is No. 165 in the Trade Promotion Series and is entitled, Industrial Property Protection Throughout the World.

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THE PLACE OF THE ADMINISTRATIVE TRIBUNAL IN OUR LEGAL SYSTEM

Nature and Functions of Administrative Tribunals—Nothing New in Their Development but the Significant Fact of Today Is the Velocity of That Development—Constitutional and Practical Objections to This Union of Executive, Legislative and Judicial Powers—Doctrine of Separation of Powers not a Mere Technical Abstraction but a Constitutional Principle Based on Historic Struggle and Express Provisions—How Far the Legislature Can Go in Delegating Functions—Exercise of Judicial Powers by Administrators and Certain Safeguards Which Are Imperatively Demanded—More Administration Needed in Courts of Justice and More of the Fundamental Principles of Justice in Administrative Tribunals*

By Hon. Arthur T. Vanderbilt
President of the American Bar Association

I

The Nature of the Functions of Administrative Tribunals—Partly Administrative, Partly Legislative and Partly Judicial

ADMINISTRATIVE LAW in common law countries has developed in an atmosphere of controversy. Thus, in 1885 Professor A. V. Dicey, who for many years dominated English thought on constitutional law, sought to snuff it out by denying its very existence:

"In England, and in countries which, like the United States, derive their civilization from English sources, the system of administrative law and the very principles upon which it rests are in truth unknown."

This denial he persisted in through the eighth edition of his "Law on the Constitution", published in 1915, despite the decision in *Board of Education v. Rice*[1] in 1911. *Local Government Board v. Arlidge*[2] in 1915 forced him to capitulate; even Dicey recognized the futility of arguing against the House of Lords. His regretful surrender is set forth in the Law Quarterly Review in an article entitled, significantly, "The Development of Administrative Law in England."[3]

But if Dicey was willing to surrender, there were many of his followers among English lawyers and judges who were not. As late as 1929 Lord Hewart of Bury, the Lord Chief Justice of England, "left the Bench", to quote Professor Frankfurter, "to break a lance for the pristine purity of Dicey's Rule of Law".[4] It was the Lord Chief Justice's belief that someone in high position owed a duty to the people to tell them precisely what was going on. Accordingly, he outlined, with unrestrained vigor, his conception of the aims of the modern bureaucrat:

"(a) get legislation passed in skeleton form (b) fill up the gaps with his own rules, orders, and regulations, (c) make it difficult or impossible for Parliament to check the said rules, orders and regulations, (d) secure for them the force of statute, (e) make his own decision final, (f) arrange that the fact of his decision shall be conclusive proof of its legality, (g) take power to modify the provisions of statutes, and (h) prevent and avoid any sort of appeal to a Court of Law.

"If the expert can get rid of the Lord Chancellor, reduce the Judges to a branch of the Civil Service, compel them to give opinions beforehand on hypothetical cases, and appoint them himself through a business man to be called 'Minister of Justice,' the coping-stone will be laid and the music will be the fuller."[5]

His action forced Lord Chancellor Sankey to appoint his Committee on Ministers' Powers. The Committee's report, an outstanding state paper, submitted three years later, has been tersely summarized by Professor C. T. Carr:

"The verdict was 'not guilty, but be careful another time'."[6]

The distinguished Committee itself said:

"We say deliberately there is no ground for public fear, if the right precautions are taken."[7]

It then proceeded to give six pages of detailed recommendations in regard to delegated legislation,[8] and nearly four more pages of recommendations in regard to judicial and quasi-judicial decisions—most of which are still disregarded.[9]

On the other hand, in this country a new knight has entered the lists in favor of Administrative Law in the person of James M. Landis, Dean of the Harvard Law School, and until recently the distinguished chairman of the Securities Exchange Commission. His point of view is indicated in a recent article, in which he writes:

"The continuity of the common man's radio programs, the security of his bank deposits, his protection against unfair discrimination in employment, his right to have light and power at reasonable rates, his protection against fraud and chicanery in our securities markets, his right to cheap railroad travel—to mention only a few of the necessities of

*Address delivered at the Cincinnati Conference on Functions and Procedure of Administrative Tribunals, held in Cincinnati on March 5, 1938. This Conference was the fourth in a series organized by the Cincinnati Bar Association under the auspices of the Ohio State Bar Association.

1. (1911) A. C. 179.
2. (1915) A. C. 120.
3. (1915) 31 L. Q. Rev. 148.
4. Hewart, *The New Despotism* (1929).
5. *id.* at 14.
6. (1935) 51 L. Q. Rev. 61.
7. (1932) C. M. D. 4060 at 7.
8. *id.* 64-70.
9. *id.* 115-118.

modern life—these are some of the new liberties which make up the right of today's common man to the pursuit of happiness, and these liberties for their protection today seek the administrative and not the judicial process."[10]

Administrative Law manifestly is a subject that engenders an atmosphere of controversy, electrically charged by competing philosophies of government, by contradictory ideals of judicial administration, and by diverse principles of social utility. A phase of that subject we are met here today to discuss, I hope, in a spirit of patient inquiry and of sober exposition. If we cannot altogether eliminate the atmosphere of controversy, we may at least confound many of the contenders, who have sought to make a partisan issue out of these matters. It is easy to demonstrate that the growth of Administrative Law, both here and abroad, has not been a partisan matter. It has proceeded under Republicans and Democrats alike. In the Federal Government any statistician may measure its growth and chart it by years. Some of the factors he might take into account are (a) the number of employees added yearly, (b) the annual increase in their payrolls, (c) the additions in office space each twelfth month, (d) the yearly growth in administrative appropriations and expenditures. The curves that would result from this study would furnish an interesting view of what has been going on with respect to Administrative Law in the Federal Government. Comparable results would be revealed by a study of any state government, either Republican or Democrat. The problem obviously is not partisan.

Nor was the development of Administrative Law as unanticipated as either Dicey or the Lord Chief Justice seems to assume. Two years after Dicey first published his great work on the English Constitution, F. W. Maitland, the foremost English legal historian of the nineteenth century, was delivering at Cambridge his lectures on constitutional history, unfortunately not published until 1908. Maitland was too good a legal historian to harbor the idea that Administrative Law was either non-existent in England, or an exotic of French origin, or a new growth of mysterious ancestry. He declared:

"If you take up a modern volume of the reports of the Queen's Bench Division, you will find that *about half the cases reported have to do with the rules of administrative law*. . . Now these matters . . . are not elementary, they are regulated by volumes upon volumes of Statutes. Only do not neglect their existence in your general conception of what English Law is. If you do you will frame a false and antiquated notion of our constitution. . . The governmental powers, the subordinate legislative powers of the great officers, the Secretaries of State, the Treasury, the Board of Trade, the Local Government Board, and again of the Justices in Quarter Sessions, the Municipal Corporations, the Guardians of the Poor, School Boards, Boards of Health, and so forth; these have become of the greatest importance and to leave them out of the picture is to make the picture a partial one-sided obsolete sketch."[11]

It is characteristic of Maitland's genius that he perceived that the inevitable trend of modern society necessitated not only the grant of new powers to existing officers but also the creation of new agencies with functions quite foreign to our traditional institutions.

The origin of Administrative Law is in legislation. It is all part and parcel of the progress from the simple state that Europeans designate as the police state to—I wish I knew what. Following the American Revolution, the chief functions of government were (1) protection from enemies without the state, (2) the preservation of peace and order within the state, and (3) the raising of sufficient revenue to accomplish these simple purposes. In the period before the Civil War, a fourth great function, the universal education of the young, was added. With the tremendous industrial and commercial development after the Civil War, the simple state, however, began to disappear. Government assumed new functions everywhere, locally, in the states, and in the nation. We are accustomed to attribute the great transition to the disappearance of the frontier, and with it of the self-sustained and self-contained family and community; and to the changes in business organization, whereby relatively small groups of men came to dominate entire industries; and to our widening comprehension of natural science and its growing application by means of new inventions, such as the automobile, the airplane and the radio, to the problems of communication, transportation and industry. This development of applied science has, indeed, reduced the size of the world and increased the dependence of men on each other, but we must not overlook the force of abstract ideas, either native or imported, and of vaguely understood race impulses, constantly shifting with changes in our population, that have caused us to look more and more to government for many services undreamed of a century ago. At first the greatest growth in new functions came in the work of our municipalities, and it was accompanied by the rise of a peculiar American institution, the political boss. One of the most interesting studies that a political scientist might make would be a collection of the portraits of the rulers of our municipalities over the period of a century. The states were not slow in following the example of the cities, but they were both soon to be left behind in the onward march by the Federal Government, strengthened by the added taxing power of the sixteenth amendment and confronted with a series of world-wide crises. Whatever the causes may have been, the last three-quarters of a century have been marked by an unparalleled increase in governmental activities, local, state and national.

As these new functions were created, who was to administer them? Obviously, neither the legislature nor the judiciary. Not the legislature, because of its large number of members, its division into two houses, its political division within each house, its lack of continuous sessions (indeed, many state constitutions have expressly safeguarded the people against both annual sessions and sessions of long duration), and, most important of all, its lack of technical skill and experience in dealing with complicated and shifting problems. This last objection applies with equal force to the judiciary, and to that must be added the paramount public necessity of maintaining the independence and impartiality of our judges if they are to function with satisfaction to the people in the difficult field of adjudication. Considerations such as these naturally led the legislature to delegate these new functions to the executive branch of the government, sometimes entrusting them to existing officials, but more often creating new offices for the purpose. Thus it has come about that these powers are exercised by a vast agglomeration of agencies—boards, bureaus, commissions, corporations, courts, departments, and officers—within the executive branch of the government.

Because the legislature cannot foresee every contingency involved in the particular problem it is seeking to control, it has become customary for it to delegate

10. Landis, *Administrative Agencies in Government* (November 1932). Dun's Review 8.

11. Maitland, *The Constitutional History of England* (1908) 505-506.

to each newly created instrumentality of the executive department the power to make regulations to carry the statute into effect, *i. e.*, to delegate *pro tanto* the power to legislate. Sometimes in England, where the legislature seemingly was not able to think through its problems, it has even gone so far as to give the administrative agency the power, popularly known as the Henry VIII clause, to adopt regulations contravening the act creating it, and this in particular has called down upon the legislature the thunder of the Lord Chief Justice.[12]

The legislature has not stopped with delegating subordinate legislative power to administrative agencies, but, to enable them to perform their work efficiently, has granted to them the power to adjudicate on cases arising within the scope of their activities. By this simple expedient, the danger of frustrating the work of the administration by a resort to the traditional courts, manned possibly by unsympathetic judges unfamiliar with the technicalities of the situation, is avoided. From the standpoint of the individual citizen the net result is that in many instances one body may make regulations affecting him, may investigate him or otherwise see to it that he complies with the regulations, may file a complaint against him, often in the language of an outraged plaintiff, may try him on the complaint, may render judgment against him and may defend any appeal from its judgment. On such an appeal its findings of fact are generally made conclusive by force of the statute, unless a constitutional issue is involved. This power presents an opportunity calling for a degree of virtue and of self-restraint on the part of the administrative agency all too rare in this workaday world. As Chief Justice Hughes has said:

"The power of administrative bodies to make findings of fact which may be treated as conclusive, if there is evidence both ways, is a power of enormous consequence. An unscrupulous administrator might be tempted to say 'let me find the facts for the people of my country, and I care little who lays down the general principles.' "[13]

This growth Dean Pound characterizes as the hegemony of the executive.[14] The disgruntled defendant is more likely to cry, however, with the Lord Chief Justice, "Bureaucracy", with appropriate adjectives of which his Lordship can furnish him a wide variety. It is true that within some of the commissions different men are assigned to the different phases of the work of the commissions, but not so long ago a distinguished general counsel of one of these newer agencies admitted that it was very difficult to prevent the men in the complaint division from confiding at lunch or after hours to the men in the trial division just who "the lugs" really were. Although there is no decision of the federal courts prohibiting the combination of judge and prosecutor, the entire proceeding is alien to the spirit of Anglo-American law. The Lord Chancellor's Committee reported that "The first and most fundamental principle of natural justice is that a man may not be a judge in his own cause,"[15] and again that "We think it is clear that bias from strong and sincere conviction as to public policy may operate as a more serious disqualification than pecuniary interest."[16]

The number of these agencies to which an individual citizen is subject in his municipality, state, and nation is legion and the scope of the powers granted to them defies enumeration. The list of such administrative instrumentalities exercising judicial functions in the federal government alone covers several pages in the report of the Special Committee on Administrative Law of the American Bar Association for 1934. If it is difficult to catalogue these activities in the federal government, the task is impossible in the forty-eight states. Until recently no attempt has been made toward a systematic study of the administrative agencies of the several states. The modes of control, however, employed by these administrative agencies are relatively few in number. They comprise such various methods as (1) investigations and reports, (2) restrictions on entry into business, (3) fixing of prices and rates, (4) regulation of services and quality, (5) prevention of discrimination (6) outlawing of monopoly and restraint of trade, (7) elimination of unfair methods of trading, (8) governmental aid to business, and, (9) governmental ownership and operation. Many businesses, however, are subjected to multiple control not only by federal agencies but also by the administrative bodies of the several states. There is nothing new in this development of Administrative Law, as Maitland pointed out fifty years ago; the significant factor today is the velocity of its development.

II.

CONSTITUTIONAL AND PRACTICAL OBJECTIONS TO THIS UNION OF GOVERNMENTAL POWERS

What are the constitutional and practical objections to this union of executive, legislative and judicial powers?

With us constitutional objections center around the doctrine of the separation of powers and the rule as to the delegation of legislative power. The doctrine of the separation of powers is not technical. It epitomizes the struggle of Englishmen on battlefields, in Parliament and in the courts against royal tyranny—a struggle running over centuries and leading ultimately to a recognition of the supremacy of Parliament by the King in the matters of legislation and especially of taxation, and of the independence of the judiciary as against both King and Parliament. The doctrine evolved from these struggles has not only been accepted as a cardinal principle of American constitutional law but has been relied upon from our earliest days in the thirteen original states as a fundamental and indispensable bulwark against despotism. The constitutions of six states prescribe a simple distribution of the powers of government into three departments, legislative, executive, and judicial; in six other states there is added a prohibition of any admixture of powers; the constitutions of twenty-six states provide for a threefold distribution of powers with designated exceptions; eight states, along with the United States, have no explicit separation of powers, but it is implied from the division of all governmental powers into three separate articles; two states provide for an administrative branch in prescribing the separation of powers.[17]

No principle of constitutional law has been more firmly rooted by tradition as well as by express provision. Each of the thirteen Colonies had been governed by Great Britain through a governor, a legislature, and courts, each with such powers as Parliament decreed. No idea of government was so unanimously

12. Hewart, *op. cit. supra* note 4 at 53-57.
13. New York Times, February 13, 1931, p. 18.
14. Pound, *The Administration Application of Legal Standards* (1919) 44 A. B. A. Rep. 445, 446.
15. (1932) C. M. D. 4060 at 76.
16. *id.* at 78.
17. Frankfurter and Davison, *Cases and Other Materials on Administrative Law* (2nd ed. 1935) Appendix I, 637-639; Bondy, *The Separation of Governmental Powers* (1896) c. III.

accepted by the Founding Fathers. Washington, in his Farewell Address, warned: "The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism."[18] John Adams reasoned: "It is by balancing each of these three powers against the other two, that the efforts in human nature toward tyranny can alone be checked and restrained and any degree of freedom preserved."[19] Jefferson was of the same mind: "The concentrating these in the same hand is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands and not a single one. One hundred and seventy-three despots would surely be as oppressive as one."[20] Madison was equally emphatic: "The accumulation of all powers, legislative, executive and judicial, in the same hands, whether of one, a few, or many, whether hereditary, self-appointed, or elective, may be justly pronounced the very definition of tyranny."[21] Holdsworth thus sums up the English view of it:

"If a lawyer, a statesman, or a political philosopher of the eighteenth century had been asked what was, in his opinion, the most distinctive feature of the British constitution, he would have replied that its most distinctive feature was the separation of the powers of the different organs of government."[22]

In its practical application the doctrine has proved as controversial as any in the field of theology. There are those, however, who insist that the experience of the sixteenth, seventeenth and eighteenth centuries has no meaning for us today. For example, Dean Landis characterizes the doctrine as the work of an Aristotelian theoretician and a page of theory out of Montesquieu. Perhaps I should quote his exact words:

"The Aristotelian theoretician who would try to make this scheme of regulation comport with some abstract conception as to the separation of powers would have his difficulties. If he conceived that this truly miniature form of government had to turn its back upon the natural course of institutional development, and follow principles devised for other conditions, other times, and other places, he would be simply sacrificing the accumulated experience of today for a dogma of the past. A pragmatic approach to government would judge by the tests of efficiency in promoting the objectives of regulation, and of the disposition of controversies along broad lines of justice and right, rather than by conformance to a page of theory in Montesquieu."[23]

I cannot bring myself to think that the generations of Englishmen who battled for centuries against royal tyranny believed that they were fighting merely to demonstrate the validity of a theory of Aristotle or a page of Montesquieu. Their incitement to risk their lives and their fortunes had no such academic origin. The problem presented is a fundamental one—has human nature so changed in recent years that it is now safe to entrust to the executive branch of the government, power which the experience of the sixteenth, seventeenth and eighteenth centuries had found to be unsafe in such hands? The testimony of Washington, Adams, Jefferson and Madison, all profound students of government, as well as men of action with widely varied views, is at least entitled to be weighed in the light of present day experience with divers kinds of strong executive governments now dominating several countries of Europe before we lightly conclude that there has been a radical change in the executive type of mind over the century.

Much of the misunderstanding of the doctrine of the separation of powers has come from extreme statements of it, as for example, in the Massachusetts Constitution of 1779:

"In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men."[24]

Such a declaration is not to be taken as literally true any more than a declaration in the California Constitution that every man is entitled not only to the pursuit of happiness, but also to the obtainment of happiness itself. Just as the California Constitution may have misled Dr. Townsend and his followers, so the Massachusetts Constitution has doubtless misled and confused others. The Massachusetts declaration, in short, never represented actual conditions here any more than Montesquieu's formulation of the doctrine represented actual conditions in England. The legislature has always exercised some judicial authority, in impeachment proceedings, in contested elections of the executive, in contempt proceedings, in seating its own members and in confirming appointments, and it has always exercised some executive authority, as in appointing and supervising its own officers and in auditing its own accounts. The judiciary has exercised legislative authority in promulgating rules of court, and executive authority in supervising its receivers as well as its subordinate employees. The executive's proclamations constitute legislation; his veto power over legislation is a familiar matter; he acts judicially in removing subordinate officers, in extradition proceedings and in deciding facts on the basis of which legislation becomes effective. The doctrine is not intended, to quote Mr. Justice Holmes, to "divide the branches into water-tight compartments,"[25] but rather to set forth an essential working principle to be applied practically in a practical world. It is based not only on the principle of the division of power, but also on the principle of the division of labor, and on the principle of the division of responsibility.

First let us consider the problem with respect to the delegation of legislative powers to administrative agencies. If the legislature were to commit all law-making powers to the various administrative agencies, which Lord Chief Justice Hewart has asserted is the aim of the bureaucrats, representative government would become a mere form or even a farce. We do not have to turn back the pages of history to find examples of representative government, so-called, that have become a farce at the hands of despots; the contemporary scene on the Continent stretches itself before our eyes, and we have had at least one example in recent years within our own country. On the other hand, if the doctrine of the separation of powers were pushed to extreme limits, governments, especially under modern conditions, could not function.

The problem is an old one. Over a hundred years ago Chief Justice Marshall said in *Wayman v. Southard:*

18. Washington, *Farewell Address* (Foster's ed. 1909) 35.
19. Adams, *Works* (1856) 186.
20. Jefferson, *Notes on Virginia* (1784) 195.
21. Madison, *The Federalist* (1787-1788) No. xlviii.
22. 10 Holdsworth, *History of English Law* (1938) 713.
23. Landis, *op cit. supra* note 10 at 7.
24. Mass. Const. (1779) Part I, Art. 30.
25. *Springer v. Government of the Philippine Islands*, 277 U. S. 189, at 211, 72 L. ed. 845, at 853 (1928).

"But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. . . . The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."[26]

This trend toward delegated legislative power has been thought to be irresistible. As long ago as 1916, Senator Root expressed the opinion that "Before these [administrative] agencies the old doctrine prohibiting the delegation of legislative powers has virtually retired from the field and given up the fight."[27] But the decisions of the United States Supreme Court in the recent *Panama Refining Company*[28] and the *Schechter*[29] cases demonstrate the rashness of prophecy. In the first case, Chief Justice Hughes said:

"The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility. But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained."[30]

In the second case, which was decided without dissent, the Chief Justice reiterated:

"Sec. 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry, or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, Sec. 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction, and expansion described in Sec. 1. In view of the scope of that broad declaration and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the codemaking authority thus conferred is an unconstitutional delegation of legislative power."[31]

The emphasis has shifted somewhat in the hundred and more years from Chief Justice Marshall to Chief Justice Hughes but the question is substantially the same: has Congress laid down policies and established standards, or has it sought to abdicate to others its essential legislative functions. The issue is necessarily one for the judiciary, and it seems reasonable to suppose that the decision in each instance will involve a consideration on the one hand of governmental necessity or policy, and on the other hand of the doctrine of the separation of powers as embodying a part of the traditions and experience of our people. It is also submitted that the more novel the field of legislation and the more far-reaching its scope, the more definite should be the policies laid down and the standards established to guide the administrative agencies. The legislature should not be permitted to legislate in a fit of absent-mindedness, to quote a phrase of the late Newton D. Baker, or even in a moment of wishful thinking.

Nor should it be too ready to rely upon administrative experts either in devising subordinate legislation or in administering it. Our oldest and most respected administrative tribunal is the Interstate Commerce Commission. It has been regulating our railroads for over fifty years, and yet today of the railroads in the United States, 31% in mileage are in the hands of receivers. As Harold J. Laski has said in a pamphlet on "The Limitations of the Expert", that should be read by everyone interested in the problem of government:

"We must ceaselessly remember that no body of experts is wise enough, or good enough, to be charged with the destiny of mankind. Just because they are experts, the whole of life is, for them, in constant danger of being sacrificed to a part; and they are saved from disaster only by the need of deference to the plain man's common sense."[32]

When we turn to the second phase of our problem, the exercise of judicial powers by administrative bodies, we see at once there is a great distinction between the legislative delegation of legislative powers to an administrative body and the legislative grant of judicial powers to the same body. As to the legislative delegation of legislative powers to an administrative body, it is clear that the legislature gave and the legislature can take away. But the situation is different with the courts. The courts did not delegate judicial powers to these administrative bodies, and, they cannot take it away. It is the legislature, that assumes to grant away these judicial powers, and whatever the inevitable necessity of the situation may be, *prima facie* it constitutes an invasion of the judicial province.

At first an attempt was made to camouflage these judicial powers in this country as quasi-judicial and in England as statutory proceedings *ad hoc*,—both elusive and deceptive descriptions of the actual grant or exercise of judicial power. It became necessary in the interest of straight thinking to abandon the use of these weasel words giving lip service only to the doctrine of the separation of powers, and to call these powers what they were in fact—judicial—but we still continue to shrink from calling the man or men who administer them judges.

We shrink from this because it is so evident that the administrative officer exercising judicial powers is so generally many things that a judge is not, and is not many things that a judge is. We know that a judge, in any common law country, has certain characteristics, certain habits of work, and certain surroundings which the experience of generations has demonstrated to be essential to the exercise of the judicial power to the satisfaction of the public. Let me enumerate these factors briefly:

1. In the first place, a judge must be independent of outside control, particularly of executive control. Lord Coke had that out with James I. Montesquieu stated this principle broadly:—

26. 10 Wheat, 1 at 42, 43, 6 L. ed. 253, at 263 (1825).
27. Root, *Public Service by the Bar* (1926) 51 A. B. A. Rep. 355, 368-371.
28. *Panama Refining Company v. Ryan*, 293 U. S. 388, 79 L. ed. 446 (1935).
29. *Schechter Poultry Corporation v. United States*, 295 U. S. 495, 79 L. ed. 1570 (1935).
30. 293 U. S. at 421, 79 L. ed. at 459.
31. 295 U. S. at 541, 542, 79 L. ed. at 1586.
32. Laski, *The Limitations of the Expert* (1931) 14.

"There is no liberty if the judicial power is not separated from the legislative and executive power."

Blackstone's statement is more exact:

"In this distinct and separate existence of the judicial power in a particular body of men, nominated indeed but not removable at pleasure by the crown, consists our main preservation of the public liberty, which cannot long exist in any state unless the administration of common justice be to some degree separate from both the legislature and also from the executive power."

While this qualification of independence is frankly admitted for judges, it is not conceded for administrative officials. Dean Landis, for example, takes the position that it is the duty of administrative bodies to conform to the program of the legislature and the executive:

"In the broad pursuit of its policies, to be effective it must align its objectives with those pursued by the executive. The direction in which it moves within the narrow sphere of its activity has, in the last analysis, to be attuned to the general movement of political thought and will. Its function is to interpret for the complex situations of which it has charge and in which it is assumed to possess expertness, the meaning and impact of the broad program of the legislative and the executive. Indeed, a survey of administrative activity over the past twenty years would give considerable evidence that administrative activity has been weak in purpose and effect when the executive was undetermined and undecided, but has recovered its strength and power as the executive has manifested direction and firmness."

I shall refrain from comment on this point of view except to say that it runs counter to our experience over the centuries and to express a doubt as to whether it will appeal to the mass of our citizens once its implications as to the judicial process are perceived.

2. A judge must be free from political influence. The danger from this source in the field of the administrative agencies is not academic; the United States Supreme Court has taken judicial notice of the environment of the administration. In the recently decided *St. Joseph Stock Yards Company* case, Chief Justice Hughes said:

"Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient."[33]

Professor Herring's "Federal Commissioners"[34] is an interesting study which amply demonstrates the soundness of the observations of the Chief Justice. Our practice in choosing these important administrative officers is in strange contrast to the English system of selecting them from Civil Service which has for generations enlisted much of the best brains and character of that country. Indeed, it has been our practice, particularly in recent years, of exempting thousands, indeed hundreds of thousands, of positions in these administrative agencies from the civil service that raises the most doubt in our minds as to the future of this important branch of our government.

3. A judge must be secure in his tenure of office, provided he behaves judicially. The notion that the judicial mind should go along with the appointing mind should have died with the colloquy between Lord Coke and James I, or at least with the flight of James II, but the incident of the *Humphrey's* case[35] shows that the heresy is still alive and there is evidence that it has some adherents in academic circles.

4. A judge is selected for his qualifications for the position. Practically everywhere he must be a lawyer, trained and experienced in the law he is called upon to administer. All too often, as Professor Herring has so ably shown, our Commissioners are chosen for political reasons. We may smile at Queen Elizabeth for choosing a Lord Chancellor because he was a good dancer—his portrait, including the legs, may still be seen in the Inner Temple—but some commissioners seem to lack even such visible qualifications.

5. A judge, moreover, lives and acts in a professional atmosphere, guided by a code of ethics evolved from the traditions of the profession centuries old. Your commissioner all too often lacks such restraining influences. For the discipline of bench and bar is substituted the camaraderie of his political associates.

6. A judge must always give his reasons for his decisions; as Burke has well said:

"To give judgment privately is to put an end to reports; to put an end to reports is to put an end to the law of England."[36]

On this point the Sankey Commission has quoted with approval the indictment of the Lord Chief Justice:

"How is it to be expected that a party against whom a decision has been given in a hole-and-corner fashion, and without any grounds being specified, should believe that he has had justice? Even the party in whose favor a dispute has been decided must, in such circumstances, be tempted to look upon the result as a mere piece of luck. Save in one or two instances, none of the Departments publishes any reports of its proceedings, or the reasons for its decisions, and as the proceedings themelves, if any, are invariably held in secret, even interested parties have no means of acquiring any knowledge of what has taken place, or what course the Department is likely to take in future cases of the same kind that may come before it. A Departmental tribunal is, however, in no way bound, as a Court of Law is, to act in conformity with previous decisions, and this fact is commonly regarded as one of the reasons for the policy of secrecy. Others may think that the Department is afraid to disclose inconsistencies and a want of principle in its decisions. However that may be, the policy is fatal to the placing of any reliance on the impartiality and good faith of the tribunal. It is a queer sort of justice that will not bear the light of publicity."[37]

7. A judge, moreover, must be prepared to have his decisions reviewed. Where he sits alone, particularly in equity or in admiralty, the review covers not only his conclusions of law but his findings of fact. Your commissioner, generally a layman, is relieved by statute of all review of his findings of fact. If the experience of centuries has demonstrated the need of reviewing the findings of facts of a professionally trained judge in order to safeguard the rights of litigants, it is difficult to see how such rights can be adequately safeguarded from the findings of a lay commissioner without a like review.

The most subtle objection to the present system of administrative adjudication remains to be stated. It is the oppression that may arise from the multiple regulation of a single business or industry. There is not a lawyer in active practice who has not had to face this situation. I can best describe the cumulative effect of administrative control by an illustration out of my own practice.

Before the Hoosac Mills case was decided I was rep-

33. *St. Joseph Stock Yards Company v. United States*, 298 U. S. 38 at 51, 80 L. ed. 1033 at 1041 (1936).

34. Herring, *Federal Commissioners* (1936).

35. *Humphrey's Executor v. United States*, 395 U. S. 602, 79 L. ed. 1611 (1935).

36. 11 *The Works of Edmund Burke* (1887) 44.

37. (1932, C. M. D. 4060 at 7 *quoting* Hewart, *The New Despotism* (1929) 48, 49.

resenting the receivers of a packing concern that owed $800,000 in processing taxes. If the tax were invalid, the concern might be reorganized, otherwise clearly not. The question of the constitutionality of the processing tax accordingly became pertinent. I began to look into the matter. Within a few days, first one lawyer, then a second, and soon a third, began to arrive from the West. Each had a brief to prove the unconstitutionality of the Agricultural Adjustment Act. Each placed his work at my disposal. Each declined to say how he had learned of my interest in the matter or whom he represented or why his own client had not taken action to resist the payment of the processing tax. One finally did ask me what I would do if I had a client subject to nearly thirty possible species of federal control. I looked out my window and did not answer him. In fact, I have not answered him yet. I am, however, tremendously impressed by the fact that astute counsel permitted their clients to pay taxes running into hundreds of millions of dollars when they were convinced that the tax was unconstitutional.

I suppose nobody would contend that the great mass of statutes setting up these administrative tribunals would ever be passed by a legislature, national or state, at any one time in their present form. This legislation has grown up sporadically in response to what were conceived to be emergencies, or in response to some pressure, as seemingly the most available way of solving the instant problem without much thought as to the total effect. Once a new agency was created, it inevitably grew, acquiring new purposes, new functions, new fields of activity. The Interstate Commerce Commission is a ready illustration. First it was to act as a policing agent, preventing rebates and discrimination. Then it was given the power to fix rates. Then it turned from the protection of the public against abuses to the development of an effective transportation system, and its jurisdiction has now been widened to include the regulation of motor trucks and pipe lines.

To what does this all lead? Clearly, to this simple conclusion—that the exercise of the judicial process requires certain safeguards in the twentieth century just as it did in the sixteenth under the Stuarts, and in the eighteenth under the Hanoverians. I am not suggesting that administrative agencies be abolished or that they be deprived of their powers of adjudication. Nor am I suggesting that administrative officials should always be lawyers. I do submit, however, that when our administrative agencies act as judges they should have the attributes, the working conditions and the professional environment of judges—the safeguards that centuries of experience have demonstrated to be essential to the maintenance and administration of what Blackstone calls common justice. This can either be accomplished within the administrative agency by a separate and distinct body of men acting as judges, or by permitting an appeal to a court on the same basis as an appeal in equity or in admiralty, or by both processes. Such a system has worked successfully in tax appeals and elsewhere. If this can be done in one field of administration, it can be done in another. There can be no question of its desirability on principle or in practice. The only persons who would object are those who have vested interests in the *status quo*.

Incidentally, while this is being done, the innumerable statutes creating administrative tribunals should be simplified so that each business or industry may be subject to fewer—preferably to one—regulatory bodies and the present duplications and overlapping be avoided. The modes of administrative control, as we have seen, are relatively simple, and there is no more excuse for the multitudinous variety of administrative statutes than there would be for returning to the varied real actions of the early common law. We smile at the old writs of *novel disseisin* or of *mort d'ancestor* but every one of the early common lawyers knew all of his real actions. I am wondering what they would say to our host of administrative proceedings, each so complicated that only an expert dares attempt to tread the mystic maze.

If the matters heard by these administrative tribunals concerned merely public officials, one might understand how it all came about, but they concern, as Chief Justice Hughes has so clearly shown, "a host of controversies as to private rights." How did it all come about? The answer, as I see it, is embarrassing but we must face the facts: a bar of specialists each concerned too exclusively with his speciality; law schools each with a curriculum framed more to meet the needs of the nineteenth century than of the twentieth (*e. g.*, only fifty-two out of eighty-two of the schools in the Association of American Law Schools give any course at all in Administrative Law and most of them are optional or graduate courses and attended by only a small fraction of the students); a generation of political scientists, who by and large are interested more in definitions and abstractions than in the realities of everyday administration.

And what is the solution? Maitland, in his Rede lecture, has shown how the common lawyers of the sixteenth century met the challenge of another body of administrative law, in Chancery, in the Star Chamber and in the Privy Council—and to the great advantage of the common law. Then, as now, the administration of the common law left much to be desired. Then, as now, what was needed was more administration in the courts of justice and more of the fundamental principles of justice in the administrative tribunals. The common lawyers of the sixteenth century met their problems and mastered them. The challenge of today is so clear that it does not need to be stated. The only question is can we meet it?

Leprosy As a Qualification for Office

(From "Hygeia")

"A little later and all down through the Middle Ages special hospitals were built for lepers, corresponding to the modern leprosariums. Some think the Order of St. Lazarus, whose members spent their lives caring for lepers, was an outgrowth of the work at the Basilias. However that may be, its members worked in the leper hospitals, which were then known as lazarettos because they were dedicated to St. Lazarus, the patron saint of lepers. A curious rule of the order was that the grand master must be of noble family and a leper, a rule that remained in force until 1253, when it became apparent that all the lepers of noble birth had been killed by the infidels, and permission was gained from Pope Innocent IV to elect a non-leper to the office. After the crusades were over, the order became prosperous, especially when Clement IV decreed that every leper must be obliged to enter a lazaretto. But as time went on and leprosy became less common in the ranks it served, the order lost some of its typical characteristics, and at the time of the French Revolution it was suppressed."

METHODS OF JUDICIAL RELIEF FROM ADMINISTRATIVE ACTION

Judicial Review of Administrative Decisions Is One of the Essential Checks and Balances in Our Governmental Scheme—Statutory Appeals, Common Law Methods of Direct Attack upon Administrative Orders and Actions, and Various Modes of Collateral Attack Furnish a Veritable Battery of Methods for Securing Judicial Relief—Consideration of Remedies in Each of These Groups—Chaos of Statutory Provisions and Confusion Due to Complete or Virtual Absence of Them in Case of Many Tribunals—Difficulties in Employment of Common Law Writs in Many States—Attack by Means of Action for Damages or for Restitution or by Resort to Writ of Injunction—Hotly Debated Controversy Centering Around Last Named Method—Interpretations of Johnson Act, etc.*

By E. Blythe Stason
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Mr. Chief Justice, Ladies and Gentlemen: Walter Lippman, in his recent book, The Good Society, develops the theme that the capacity of governmental organization to govern is of necessity subject to the limitations of human frailty—that the quality of government can be expected to rise no higher than the capacity of the governors. This thought is not without significance in considering the subject of judicial review of administrative action.

Modern governmental administration deals with a vast multitude of complexities comprising human rights and human conduct on many fronts. The task strains to the utmost the capacity of the government personnel. No man, however well intentioned, is perfect. Error is bound to creep in. So the functioning of government inevitably carries with it a backwash of erroneous and sometimes even capricious and arbitrary action. Judicial review of administrative action can and should be a salutary check upon error. It should neither be so omnipotent and searching as to destroy necessary administrative effectiveness; nor should it be so impotent and confined as to fail to check palpable abuse of power. In view of the transcendent importance of contemporary governmental administration, judicial review should be explored, scrutinized, studied and evolved with a consciousness of its fundamental importance, and a realization of the need of thoughtful, scientific attention. The proper balance between the courts and administration is at stake. Judicial review is one of the essential "checks and balances."

The subject divides itself naturally into two parts: First, the *methods available* for securing judicial relief from erroneous administrative action; second, the *scope of judicial review*, i.e., the extent of control exercised by the courts over administrative decisions. The first of these two subdivisions of the subject falls to my lot. The second will be dealt with by the next speaker on the program.

Far from being frugal with remedies, the law is in this instance fairly liberal. Indeed, it furnishes us with a veritable battery of methods by which to attack erroneous administrative orders. The methods may for convenience be grouped under three heads.

1. Statutory appeals, that is, appeals provided usually by the statute creating the offending administrative agency for the express purpose of reviewing the agencies' decisions.

2. Common law methods of direct attack upon administrative orders and action, that is certiorari, mandamus, prohibition and habeas corpus, and the like.

3. Various modes of collateral attack, including suits for damages against the offending officers, defense to prosecution for alleged violation of administrative orders, and suits to enjoin the enforcement of orders. Proceedings in this third category are not, strictly speaking, in review of the orders but rather they are methods of securing relief therefrom. They are based upon the voidness and nullity of the orders and provide relief against action sought to be predicated upon them.

First we shall examine briefly the principal outlines of these various methods of securing judicial relief from administrative action. Then I shall ask you to consider for a moment the need and prospect of improving this phase of our mechanism for administration of justice.

1. Statutory Appeals

First, then, the statutory appeal. In most well-developed acts creating administrative tribunals, especially those given judicial or so-called quasi-judicial powers, the course of procedure for judicial review of the administrative decisions is fairly completely outlined in the pertinent statutes. However, the provisions vary in important particulars both from state to state and from tribunal to tribunal. Some statutes provide for review by the state supreme courts, some by courts of original jurisdiction with appeal to the supreme courts, and, in the case of the federal system particularly, some by the intermediate appellate courts with final appeal to the highest court in the system. Some provide for review on the record prepared by the administrative tribunal. Others provide for a trial *de novo* in the courts. In some instances the reviewing power of the courts extends to facts as well as to law. In others it is limited to questions of law only. In others the language

*Address delivered at the Cincinnati Conference on Functions and Procedure of Administrative Tribunals, Cincinnati, March 5, 1938.

used is so general and vague that no one can possibly tell from it just what extent of reviewing power was intended. And in the case of decisions of the Veterans' Administration in Washington we find this intriguing provision:—"All decisions rendered by the Administration of Veterans' Affairs . . . shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision." (38 U. S. C. A. 705.) There really is very little rhyme, reason, or system in the statutory provisions for appeal from administrative decisions.

A brief comparison of a few of the acts will illustrate the diversity. For example, the Ohio Public Utilities Commission Act provides for the review of commission orders by "appeal" to the Supreme Court of the State. The appeal is based upon the transcript prepared before the Commission, and, as concerns the scope of the court's reviewing power, the Supreme Court is given the power to "reverse, vacate or modify" any Commission order if "upon consideration of the record" the court is of the opinion that the order was "unlawful and unreasonable," a meaningless, almost cryptic, phrase.

Contrast these provisions with those of the Wisconsin Public Utilities Act. That Act provides for a review of Commission orders by commencing an action "in the Circuit Court for Dane County against the Commission as defendant to vacate and set aside such order on the ground that it is unlawful or unreasonable. Appeal may be taken from the Circuit Court to the Supreme Court. The record prepared before the Commission is certified to the reviewing court under this Act, but it may be supplemented by additional testimony taken before the court. If the additional testimony is found by the court to be different from that offered upon the hearing before the Commission, the court shall transmit a copy of it to the Commission. Upon receiving it the Commission may, if it so desires, modify or rescind its order, but if it fails to do so the court proceeds to dispose of the case on the basis of the original record together with the new testimony. The scope of the power of the court to overhaul the decision of the Commission is, as it is in Ohio, governed by the curiously inadequate phrase "unlawful or unreasonable"—whatever that may mean. By using such vague language to define the boundary between the power of the Commission and that of the court, the respective spheres are left virtually undetermined by the legislative act and hence they must be fixed as occasion arises by judicial interpretation from time to time—a not too satisfactory arrangement.

Still a third example,—the practice under the California Public Utilities Act. This practice is different from either that of Ohio or that of Wisconsin. Review is directly by the State Supreme Court upon what is called a writ of certiorari. It is not really a writ of certiorari. That is just a name. No new or additional evidence may be introduced in the court, but the cause shall be heard on the record as certified by the Commission. The power of the court is closely limited by express statutory phraseology. It is provided that "the review shall not be extended further than to determine whether the Commission has legally pursued its authority including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the State of California." The findings and conclusions of the Commission on questions of fact are declared to be final and not subject to court review. It is expressly provided that the phrase "questions of fact shall include ultimate facts and findings and conclusions of the Commission on reasonableness and discrimination." In short, the legislature in California has attempted to delineate with some care the boundary line between the power of the Commission and that of the court by expressly prescribing the area of conclusiveness of Commission decisions.

These three statutory appeals taken from three different statute books illustrate the diversity of provision as to this phase of the administration of justice. As to the court selected to do the reviewing, in Ohio it is the Supreme Court, in Wisconsin, the Circuit Court with appeal to the Supreme Court, in California the Supreme Court. As to the record to be used as the basis of judicial review, in Ohio and California it is the record prepared by the Commission and that alone, but in Wisconsin additional testimony may be taken. As to the scope of the court's power to review, a subject which falls more properly under the jurisdiction of the next speaker on the program, Ohio and Wisconsin, in language not too meaningful, provide that the order may be vacated if it is found to be "unlawful or unreasonable." In California review is expressly limited to questions of law including those of constitutional right. These divergencies are typical of what we find wherever we survey the entire field. They are part of a statutory chaos, a heterogeneous confusion of ill-conceived and badly drafted provisions, grown more or less like Topsy and badly needing scientific attention.

Nor is this all. Similar differences are almost invariably found between the statutory provisions for appeal from different tribunals in the same state. For example, in my own state of Michigan Public Utilities Commission orders are reviewed as they are in Wisconsin by commencing an action in the circuit court in chancery for the County of Ingham against the Commission as defendant to vacate and set aside the order on the ground that it is "unlawful and unreasonable." New testimony may be taken in addition to the transcript sent up from the Commission, provided, however, (as is required in Wisconsin) that such new testimony be referred to the Commission for revision of its order if it so desires. Appeal may be taken from the circuit court to the Supreme Court of the State.

On the other hand, under the Michigan Workmen's Compensation Act proceedings for review of Commission awards take the form of a writ of certiorari issued directly by the Supreme Court. Proceedings are based on the record prepared by the Commission, and it is expressly provided in the Act that findings of fact made by the Commission acting within its powers shall in the absence of fraud be conclusive. So not only is there confusion in looking across state boundary lines, but, still worse, the practice in any one jurisdiction is generally found to be more or less of a hodge-podge.

Nor is this all. There are still other subjects of diversity. There are differences with respect to the timing provisions (the number of days allowed for this or that step on appeal), with respect to supersedeas pending determination of the appeal, with respect to priority on court dockets, and numerous other matters. Some statutes give the courts the power not only to reverse and affirm, but also to modify, thus conferring power to enter decrees directly disposing of appealed

cases. Others limit the court's power to reversal or affirmation.

In short, while most of the well-developed statutes make some attempt to provide for statutory appeals from Commission decisions, there is an utter lack of uniformity of plan and virtually a complete absence of careful thought concerning the all-important matter as to how the courts may most wisely be used to eliminate error and preserve to a proper measure the essential balance between law and administration. Usually these provisions appear well down at the end of the statutes. Statutes are long and I suspect by the time the legislators draft them and get down to these provisions, they get rather tired, and they do not pay much attention to them.

However deplorable the chaos of statutory provision may be, it is as nothing compared with the confusion resulting from either the complete or virtual absence of provision on the subject as regards many administrative tribunals and agencies. In a multitude of instances quasi-judicial or quasi-legislative powers, or both, are conferred upon administrative agencies with no attempt whatever to block out the course and nature of judicial relief from erroneous action. This is more frequently the case in state statute law than in the federal system. Boards of equalization, tax commissions, boards of health, boards of zoning appeals, unemployment insurance commissions, welfare commissions and the great multitude of licensing boards, commissions and agencies, licensing everything from doctors and lawyers to chiropodists and prize fights, exercise a wide variety of powers impinging directly upon private rights, and the absence of adequate statutory provisions for review of their decisions can almost be said to be the rule. When no provision is made by statute we are not remediless, but we must turn to common law methods of relief. It is convenient to divide such methods into two groups: (1) methods of direct attack, and (2) methods usually referred to as collateral in nature. Let us hastily survey these methods.

2. Common Law Methods of Direct Attack

There is the common law writ of certiorari. It is available when no adequate statutory appeal is provided to review judicial or quasi-judicial decisions of administrative tribunals. It may not, however, be used if the administrative agency has exercised a sub-legislative power or a mere administrative power. The court issuing the writ may set aside the administrative order in the event it finds that the tribunal has exceeded its jurisdiction, or has been guilty of "illegality," whatever that may mean, or, according to most of the decisions, if error of law has been committed. The writ does not, however, avail the aggrieved party who feels that the decisions of the tribunal run counter to the weight of the evidence. The facts are deemed found conclusively against the petitioner if the decision certified is supportd by competent evidence.

Then there is the writ of mandamus. It is also useful in certain instances. It will be issued to compel an administrative tribunal to exercise powers which it is required by law to exercise, but not to compel the exercise in any particular way. So it may be used to compel a tribunal with quasi-judicial powers to assume jurisdiction over causes submitted to it. It will be issued to compel an administrative officer to perform any legal duty resting upon him which he neglects or fails to perform.

Then there is the writ of prohibition. It also has its uses, although it is rather limited. It will be issued by a court to restrain an administrative tribunal from attempting to adjudicate a case or controversy lying outside its jurisdiction.

Then there is the writ of habeas corpus. It may be resorted to to compel the release of a person held in custody by an administrative order without right.

These common law writs all serve good purposes. Taken together they complement each other and fairly well cover the field. But in many states they are so hedged about by barnacles of history and are so little used and understood by many members of the Bar that they all too often serve to multiply rather than to aid the confusion which surrounds our subject.

3. Common Law Methods of Collateral Attack

Finally the lawyer who is attempting to unearth judicial relief for an aggrieved client may turn to the battery of remedies usually classified under the head of collateral attack.

Under some circumstances relief may be secured by an action for damages. For example, a health officer decides that a certain condition creates a health nuisance. He abates the nuisance and in so doing destroys private property. He may be sued for damages. In most courts he will be held liable for damages if he made a mistake and the nuisance did not in fact exist, even though he exercised the best of good faith and reasonable care and skill in reaching his determination. In a very few courts he will be protected if he proceeded in good faith but nevertheless made an error of fact. In other words, the good old-fashioned tort remedy for damages can under some circumstances be turned into a mechanism for judicial review of administrative action. In fact, this particular device is one of the oldest methods of judicial review.

Then again the suit may take the form of an action for restitution, as, for example, an action to recover taxes unlawfully assessed and collected. However, to be successful the tax must be found wholly void as distinguished from merely erroneous. This distinction sometimes results in embarrassment. For example in a New York case, (*United States Trust Company* v. *New York,* 144 N. Y. 488), action was brought to recover back the sum of $139,000 paid to the city under an allegedly unlawful assessment. Relief was denied, not because the assessment was free from error, but because it was not wholly void. The plaintiff should have sought a review of the assessment by a writ of certiorari. He had entered the temple of justice by the wrong door to the tune of $139,000.

Then again the writ of injunction may be resorted to. It will be issued by a court of equity when there is no adequate remedy at law for the purpose of restraining an administrative officer or agency from taking action to enforce a void administrative order. At least most state courts insist here also, and logically they should insist, that the order be void as distinguished from being merely erroneous. That is not true in federal injunction against federal administrative law.

No mention of the writ of injunction would be complete without mentioning the power of the federal courts to use it to restrain the enforcement of state administrative decisions. This leads us into one of the most hotly debated controversies in the field of contemporary administrative law. The history of the controversy is a dynamic tale of law in action.

Section 24 of the Federal Judicial Code as first

adopted on March 3, 1875 (18 Stat. 470) gave the federal district courts jurisdiction over all suits of a civil nature, at common law or in equity, when the amount in controversy exceeded $3,000, and the suit either arose under the Constitution or laws of the United States, or was between citizens of different states. Under the authority of this section the enforcement of many state administrative orders as well as state statutes has been at various times enjoined by federal district courts, with a good deal of acrimony resulting between the sovereign powers involved.

The provisions of Section 24, as in effect from 1875 to 1910, gave the federal district court power to issue an injunction in such cases, thus enabling a single federal judicial officer to restrain official state action which had received the sanction of many state officials. Such an arrangement enhanced the animosity on the part of the state officials.

In 1909, the South Dakota legislature passed a two cent fare law. The railroads made boast of the fact that within thirteen minutes of the time the governor signed the bill in the capital at Pierre, the federal court sitting in Sioux Falls had issued an injunction restraining him and all other state officials from enforcing it. This event, added to the feeling previously created by the enjoining of other state legislative and administrative action, caused a storm to break in Congress. Senator Crawford of South Dakota arose and demanded the passage of an amendment to the Judicial Code depriving the lower federal courts of jurisdiction in such cases. The Senator's bill failed of passage, but instead in 1910 the so-called Overman amendment was passed providing that temporary injunctions restraining the enforcement of "state statutes" (that was the phrase used) should be issued only if ordered by three federal judges, and providing further for a direct appeal to the United States Supreme Court. This was the genesis of what is known as Section 266 of the Judicial Code. The amendment did not explicitly refer to orders of state administrative commissions. It was just a state statute. It was a compromise measure.

About two years later the South Dakota Railroad Commission entered an order fixing the maximum passenger fares at two and one-half cents per mile. Again the federal district judge, sitting alone, interfered, holding that the three-judge requirement of the Overman amendment did not apply to the orders of state commissions, because, even though they were "legislative" orders, they were not "state statutes," as that phrase was used in the Overman amendment. So the enforcement of the commission order was enjoined.

Again the storm broke in Congress. Senator Crawford demanded an explicit provision protecting state administrative orders from single judge interference. The amendment which he proposed to that effect was adopted in 1913, and it was further provided that whenever a state judicial proceeding should be brought to enforce a state statute or administrative order, if the state proceeding should be accompanied by a stay of enforcement of the objectionable statute or order until the determination of the case in the state court, all proceedings in the federal courts should be stayed. This stay provision would seem to give any state which desires to litigate its controversies in its own courts the full opportunity to do so by simply starting enforcement proceedings and issuing a stay order pending their determination. Unfortunately, however, but few states have had state judicial procedures adequate to take advantage of the provision. Furthermore, this portion of the amendment was so worded that the federal courts have held that it does not apply in cases in which temporary restraining orders are issued on the ground of irreparable loss or damage, pending hearing on the application for interlocutory injunction. It applies only when an injunction is requested without such temporary restraining order. Since almost every case involving state administrative orders is alleged to be accompanied by irreparable damage requiring a temporary restraining order, the stay provision of Section 266 has proved a mere empty gesture.

Then on May 10, 1928, a three-judge court in New York, sitting pursuant to the requirements of Section 266, enjoined the Transit Commission from interfering with the charging of a seven cent fare in the New York subways. This decision was subsequently reversed by the Supreme Court of the United States, but meanwhile Senator Wagner of New York arose in Congress and demanded that Section 24 be amended to abolish completely federal equity power over state public utility commission orders. Senator Wagner's bill was referred to the Judiciary Committee and was never reported out, but finally on May 14, 1934, after the lapse of six more years, during which numerous bills of similar purport were introduced into Congress and discussed at length the so-called Johnson Act (48 Stat. 775, 28 U. S. C. A. 41) was adopted.

This Act deprives the federal district courts of jurisdiction to enjoin the enforcement of state administrative orders when such orders (a) affect rates chargeable by a public utility, (b) do not interfere with interstate commerce, and (c) have been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the state courts. This Act constitutes the most recent statutory event in a generation or more of conflict between state sovereignty, presumably attempting to promote the state's general welfare, and judicial sovereignty, attempting to guard interests supposedly protected by the Constitution. The Act calls for and is now in the process of being interpreted by the courts. While much will depend upon the results of this interpretation, it is safe enough to predict that the major political issue, i.e., the extent to which federal courts should be empowered to issue injunctions against the state administration action, is not yet finally settled.

Several cases have already been handed down by the federal courts, including the United States Supreme Court, involving interpretations of the Johnson Act. It is obvious that much hinges upon the question as to what constitutes "plain, speedy and efficient remedy," at law or in equity in the state courts. The United States Supreme Court has held (*Mountain States Power Co.* v. *P. U. C.*, 299 U. S. 167), that state judicial processes which do not explicitly provide for a stay of the administrative order pending a final determination of the cause in the state supreme court cannot be deemed "plain, speedy and efficient." The federal district court in Oklahoma has held (*Cary* v. *Corporation Commission*, 9 Fed Supp. 709) that a state procedure under which the state courts exercised legislative as well as judicial power on appeal from the state Corporation Commission could not constitute a plain, speedy and adequate remedy (affirmed "per curiam," 296 U. S. 452) in the courts of the state. In view of these interpretations and the obvious uncertainty as to what constitutes a "plain, speedy and adequate remedy" in the courts of the state, not to mention a number of other questions that have called for judicial considera-

tion, it seems apparent that the federal equity injunction is still a potent instrumentality for the protection of aggrieved clients against erroneous state administrative decisions. And finally, it seems that the cause of friction is not yet fully dissolved.

CONCLUSION

What conclusions can and should we draw with respect to this medley of remedies—the diverse statutory appeals, the common law writs of certiorari, mandamus, prohibition, and habeas corpus, suits for damages and restitution, writs of injunction, etc.? We find differences in practice from state to state. We find differences from tribunal to tribunal within the same state. Worst of all, if we study the characteristics of the various modes of judicial review more carefully, we find that it is sometimes extraordinarily difficult to tell which is the most effective remedy and even which is the correct remedy to use in a particular case. As previously indicated, it not infrequently happens that a litigant who is seeking relief by one of the methods, e.g., injunction, is non-suited because he should have selected another, e.g., certiorari. Why should we endure a system characterized by such confusion and such utterly useless technicalities?

We can find an excellent analogy for our problem if we turn back the pages of history to the time when the practice in the law courts consisted primarily of prestidigitation with respect to the so-called common law writs. Then, instead of stating the cause of action in plain and concise language, it was necessary to scrutinize the facts with especial care in order to determine whether one should plead in trespass, or trespass on the case, or replevin or detinue or debt or covenant or special assumpsit or general assumpsit, and if so, what counts or counts in general assumpsit. It was lots of sport for the mathematically minded legalists. It was hardship for the clients. In practically all of our states code pleading and rules of court have swept away the fine-spun distinctions of the common law writs.

We have a nearly parallel situation today regarding the methods of judicial review of administrative decisions. We have a confusion of methods, and all too frequently the selection of the incorrect method impairs the rights of the client. Has not the time arrived for the evolution of a properly conceived procedure for the judicial review of administrative decisions? Such decisions are no longer exceptional in our jurisprudence. They constitute a great bulk in current litigation. The need of simplification of methods of judicial review is fully as great as, if not greater than, the former need of simplification of common law pleading.

Finally, and to return to my point of starting, we are dealing with a mechanism not only of importance in jurisprudence, but one of overwhelming significance in government and public administration. As I have said, judicial review of administrative decisions is one of the essential checks and balances in our governmental scheme. If we fail to evolve a smoothly working, capable and effective method of preserving the proper balance between necessary governmental regulation by administrative officers on the one hand and protection of personal and property interests from arbitrary action on the other hand, we shall fail in a measurable degree to preserve the governmental scheme which we hope will continue to survive. The time has arrived for a careful and intelligent evolution of both proper theory and proper practice with respect to this particular balancing mechanism.

Thoroughly aware of the problem, the American Bar Association has two committees at work on it: a Special Committee on Administrative Law and a Committee on Administrative Agencies and Tribunals in the Section on Judicial Administration. These Committees deserve the earnest attention and support of all persons interested in the administration of justice.

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POWER OF THE COURTS TO SET ASIDE ADMINISTRATIVE RULES AND ORDERS

Enactment of Statutes Providing That Findings of Fact by Administrative Agencies Shall Be Conclusive upon the Courts Has Made it Necessary for Them to Draw a Sharp Distinction Between Findings of Fact and Conclusions of Law—Wisconsin's Rule of Thumb—How Far May Courts Be Concluded by a Statutory Provision from Re-examination or Retrial of Facts out of Which Controversy Arose and Upon Which Liability Must Rest?—Right to a Trial de Novo as to So-Called "Constitutional or Jurisdictional Facts" Settled by Sweeping Decision of Supreme Court of United States in *Crowell vs. Benson* Dealing with Longshoremen's Act—Effect of Decision on Administrative Proceedings under State Statute etc.*

By Hon. Marvin B. Rosenberry
Chief Justice Wisconsin Supreme Court

Mr. Chief Justice, Ladies and Gentlemen: First of all, I should like to congratulate the Chief Justice of the state of Ohio upon his ability to maintain the proper tempo of this program. I was very much interested at the luncheon today when he said he was going to bring this program out on time. Having been engaged for the last ten or fifteen years in testing the terminal facilities of lawyers, I wondered exactly how he was going to do it. I should judge from the results he achieves, that the way he does it is to approach them before the meeting is called to order. He is not in that respect as severe as they say a former Chief Justice of the state of Wisconsin, a man who adhered very strictly to the rules of practice, was. He stopped a lawyer in the midst of his argument one day, and said "I am sorry, sir, your time is up." On the way out, this lawyer, who felt somewhat disgruntled and embarrassed, said to a fellow practitioner, "The Chief Justice is very prompt about a recess. He stopped me in the middle of a sentence." "Oh," said his fellow practitioner, "that is nothing at all. He stopped me right in the middle of the word 'it'" (Laughter.)

The process by which a field of legitimate administrative activity has been carved out of a system of government in which all governmental power was expressly and solely vested in the executive, legislative and judicial departments and, generally speaking, was not delegable, is an interesting chapter in constitutional history but one which is beyond the scope of this paper. It is enough to state that, with limitations that need not be set forth here, administrative agencies make rules which have the force and effect of law and are in form legislative, and that they find facts in proceedings which are fundamentally judicial in purpose and scope. It is the purpose of this paper to consider briefly the nature and extent of the power of the courts to review and to set aside findings of fact by administrative bodies in proceedings which are of a quasi-judicial character. The existence of this judicial power to review was the ground upon which the fact-finding powers of administrative agencies were sustained as not constituting a violation of due process or an invalid delegation of judicial power.

It may be stated broadly that the courts will interfere in all cases involving administrative action where the constitutional rights of parties are involved whether the question raised relates to a rule or to a finding or determination. They will also exercise such powers of review as are conferred upon them by the act creating the agency or under the applicable provisions of general laws. Whether or not a particular question is justiciable or non-justiciable, if by that is meant whether or not it is subject to retrial or review in the courts, is a matter which depends very largely upon the statutory provisions in the jurisdiction where the question arises. The distinction between justiciable and non-justiciable questions is not very clear to me and such observations as I shall make in regard to the matter will be made in a subsequent part of this discussion.

The attempt of legislatures to preserve the practical advantages of administrative fact-findings by preventing the re-trial of disputes over which such agencies have primary jurisdiction prompted the passage of laws which provided that findings of fact made by these agencies should be conclusive upon the courts. The enactment of these statutes made it necessary for the courts to draw a sharp distinction between findings of fact and conclusions of law. Manifestly in the time at our disposal we cannot enter upon a metaphysical discussion of this subject.

In Wisconsin we have a rule of thumb which answers all practical purposes in this field. We say if the conclusion to be reached is one to be deduced by a process of reasoning from antecedent facts, it is a finding of fact. If, however, the required conclusion cannot be reached except by applying to the fact situation a rule of law or a legal concept, then the result is a conclusion of law. Whether or not a workman sustained an injury at a particular time and place is a question of fact. Whether the workman when injured was an employee or an independent contractor can only be determined by applying rules of law to the fact situation and is therefore a conclusion of law. This rule of thumb would not produce a correct answer in some cases tried according to the course of the common law where the question is whether the issue is one for the

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jury or for the court. A conclusion arrived at originally as a conclusion of law may for certain purposes be treated as a fact. When in a compensation action it is alleged that A.B. and C.D. are husband and wife the allegation is ordinarily treated as one of fact. If, however, the question to be determined is the relation of A.B. and C.D. the allegation would be regarded as a legal conclusion. In most administrative proceedings a correct result is reached by resort to the rule of thumb.

There would seem to be no doubt that in any case in which the question was properly raised a court would determine whether the constitutional rights of a party to a controversy had been impaired, whether the impairment was due to an order or rule having the force of law or to a determination by the administrative agency which violated the constitutional rights of the party. Most claimed invasions of constitutional rights under administrative procedures arise under the due process clause of the Fourteenth Amendment and similar provisions in state constitutions. Less frequently it is claimed that a party has been deprived of his constitutional right of trial by jury. That claim, however, is made less and less frequently as the Bar becomes more and more familiar with administrative procedure and the legal consequences attributed to it.

We come now to the discussion of a matter which is of first-rate importance, whether we consider its effect upon the rights of parties or the social consequences which may flow from it. How far may a court be concluded by statutory provisions from a re-examination or re-trial of the facts out of which the controversy arose and upon which liability must rest? The importance of this matter was very greatly emphasized by the decision in *Crowell* v. *Benson*.[1] In that case it was in effect held that the person against whom liability was claimed under the longshoremen's act could not by act of Congress be deprived of the right to have certain facts necessarily found by an administrative agency ascertained by a trial *de novo* in a court. The facts that were referred to were: (1) that the transaction arose upon the navigable waters of the United States; and (2) that the relation of employer and employee existed between the claimant and the respondent. I cannot go into a detailed statement of the reasons which the court gave for this conclusion but it rests upon the proposition that the administrative agency had no jurisdiction to act unless these two fact situations existed; that is, if the transaction arose beyond the navigable waters of the United States no federal court could be given jurisdiction; if the relation of employer and employee did not exist, then liability without fault could not be created and as to those matters the respondent was entitled to a trial *de novo* although the act made the findings of the deputy commissioner conclusive. It was held that if the courts were deprived of the power to try the matter *de novo* the judicial power vested in the federal courts by the Constitution would be impaired. In *Crowell* v. *Benson*, the court laid down and developed the doctrine of "constitutional fact." I can see no distinction between "constitutional facts" and "jurisdictional facts" except that one is a fact situation prescribed by the Constitution and the other a fact situation prescribed by statute, otherwise they are of equal dignity. While the decision in *Crowell* v. *Benson* aroused a storm of criticism, subsequent decisions of the Supreme Court of the United States indicate that the doctrine there announced will be adhered to.[2]

It is difficult to understand why such great dignity should be assigned to constitutional or jurisdictional facts in the field of administrative law when they are not accorded equal dignity in other fields, as for instance, in the field of taxation or the taking of private property by condemnation.

Since the *Ben Avon* case[3] it has been held that whether or not a particular rate order was confiscatory must be determined upon facts to be found anew by the reviewing court. Value may be found by a taxing officer and in a proceeding before a tax board of review if the board of review confirms the assessment it becomes conclusive if sufficient evidence is adduced before the board to sustain the assessor's valuation. On the other hand the finding of a rate-making agency which proceeds in conformity with due process requirements is not accorded finality. It is submitted that the determination of fact, that is, value, is no more "jurisdictional" in one case than in the other. If the assessor's valuation is in excess of the true value of the property assessed and the taxpayer is compelled to pay a tax upon the excess, his property is confiscated just as much as the property of a utility is confiscated if it is taken by way of an order fixing rates based on a value lower than its reasonable value. The ultimate consequences may be very much more important in one case than in the other but it seems to me that the legal principles which underlie the two are exactly the same.

The Act under consideration in *Crowell* v. *Benson* did not provide that all the evidence should be offered in the proceeding before the deputy commissioner. The sweeping language of the decision leaves no doubt that as to the so-called constitutional or jurisdictional facts the person against whom liability is assessed is entitled to a trial *de novo* in a court in all cases.

It must be remembered that the longshoremen's act under consideration in *Crowell* v. *Benson* provided that the remedy for review was "through injunction proceedings, mandatory or otherwise." Attention was called to the fact that the statute did not seek to confine the court to the record made before the deputy commissioner or to the evidence which he had taken. Even though in a proceeding under a statute containing such a requirement the court might adhere to its determination that constitutional or jurisdictional facts were subject to re-trial in a court, it might as a matter of practice where a statute required all of the evidence to be produced before the commissioner, give little weight to such fresh evidence as should be adduced before the court and so discourage re-trial of issues of fact determined by the commissioner. No reason is perceived why such a procedure would not obviate the necessity of a trial *de novo*. All evidence material to the issue could be offered and received upon the hearing before the administrative agency. From the evidence upon review the court could determine the facts for itself giving such weight as it chose to the findings made by the commissioner. In practically every rate case a determination must be made by the administrative agency respecting the existence of the so-called constitutional or jurisdictional facts. That is not true, however, in other fields. In administrative orders involving labor relations in the vast majority of cases no

1. 285 U. S. 22 (1932).

2. See St. Joseph Stockyards Co. v. United States, 298 U. S. 38 (1936).

3. Ohio Valley Water Co. v. Ben Avon, 253 U. S. 287 (1920).

contention is made that the relation of employer and employee did not exist. Congress has already defined what constitutes a labor dispute and prescribed the conditions under which picketing may be lawfully carried on and many other like questions have been defined by legislative enactment. I have no statistical basis for the judgment but in my opinion in not one-tenth of one per cent of the cases involving the relation of master and servant or employer and employee is the existence of the relation denied or brought in controversy. I refer to the whole body of cases that are referred to these administrative tribunals.

We are next led to inquire what effect the decision in *Crowell* v. *Benson* has upon administrative proceedings under a state statute. This will be considered in connection with the Wisconsin Act. Wisconsin was a pioneer in this field and many states copied its compensation act. In sustaining the workmen's compensation act (1911), the Supreme Court of Wisconsin held that the jurisdiction of the industrial commission rested upon two facts: (1) that both employer and employee had elected to come under the Act; and (2) that the injury was received in service growing out of or incidental to the employment. It held that while the industrial commissior must decide these questions in each case where they were raised, the decision of that commission could not be conclusive upon the court for the reason that they were jurisdictional questions. While the act made the findings of the commission conclusive, it provided for a review by a court of general jurisdiction; that upon review the court could set aside the order for one of three reasons: (1) that the board acted without or in excess of its powers; (2) that the award was procured by fraud; and (3) that the findings of fact did not support the award. Most compensation acts have this or some similar provision with respect to the weight to be given to findings of fact made by the agency charged with the administration of the law. In sustaining the constitutionality of the Act, the Supreme Court of Wisconsin said:

"We regard the expression 'without or in excess of its powers' as substantially the equivalent, or at least as inclusive, of the expression 'without or in excess of its jurisdiction,' as those words are used in *certiorari* actions to review the decisions of administrative officers and bodies."

The question then arises when does an administrative agency proceed in excess of its jurisdiction with respect to findings of fact? In Wisconsin it was held from an early day that the principles of law applicable to a review of tax proceedings on *certiorari* would be applied in workmen's compensation cases; in other words, if there was any evidence, however slight, which sustained the findings, the agency had acted within its jurisdiction.

I would like to digress here for a moment to say this. It has been suggested in the course of this discussion today that laws creating these administrative agencies should provide for a review by the courts upon all questions. It seems to me obvious that if such a review were provided, they might just as well abolish administrative tribunals, because the whole controversy would be left to the court, because it would be in the court where you would get a final determination. Therefore, the proposition which looks to a review by the court of the whole matter, including questions of fact, it seems to me would bog the courts down, throw them into politics, or do away with these administrative statutes. Personally, I regard this development of administrative law as one which has grown out of necessity, and whether we like it or not, we have it here, we have it perpetually, and we must learn how to deal with it.

The court was called upon to review the whole matter[4] recently (1937) and after giving full consideration to *Crowell* v. *Benson*, held that the compensation act provides with respect to jurisdictional facts for a review of the same character and extent as that afforded by certiorari; that such a review satisfies the requirements of due process and that this determination is consistent with the holding in *Crowell* v. *Benson*. By some it is thought the court unduly limited itself with respect to its right of review as to jurisdictional facts; that instead of holding as it did if there was any evidence, however slight, which sustained the finding, it should have held that it would inquire upon the whole evidence whether the minds of reasonable men could have come to the conclusion reached by the administrative agency.

Although the precise question has not been discussed by the Supreme Court of the United States so far as I am able to discover, prior cases indicate that this determination will be upheld. In 1932, upon the authority of two prior cases, the decision in *Helfrick* v. *Dahlstrom M. D. Co.*, 256 N. Y. 192 (1931), was affirmed by the Supreme Court of the United States.[5] That was just shortly before *Crowell* v. *Benson*. The Act under consideration in that case made the findings of the administrative agency conclusive. The Court of Appeals of New York upheld the statute on the authority of *Interstate Commerce Commission* v. *Union Pacific R. R. Co.* (1912), 222 U. S. 541, and other cases. It held that rate-making was a legislative matter while the determination of compensation was a judicial matter and for that reason the findings of the industrial board could be made conclusive. I had supposed the law was the other way,—that a finding of fact by the legislature was given the greater weight.[6] I have always supposed the rule was the other way, that if you had a legislative determination of fact, that that was conclusive, but apparently the Court of Appeals thought differently. It is worthy of note that the Court of Appeals in commenting upon the distinction between rate cases and other cases involving administrative determinations of jurisdictional facts said:

"So many are the complications in determining the question of fair return that necessity, not theory, has moved the courts to this conclusion."

This is the best justification for the distinction between constitutional and jurisdictional facts and other facts upon which liability must rest that I have found in a court decision. Whether necessity is a satisfactory basis for the distinction, I leave to you.

There is every reason to believe that the doctrine of *Crowell* v. *Benson* will not be applied to the determinations made by administrative agencies created by state law. As recently as *Highlands Farm Dairy, Inc.* v. *Agnew*, 300 U. S. 608 (1936), the Supreme Court of the United States declared that it had no concern with the distribution of governmental powers in a state. This leads to the conclusion that if a state statute authorizing an administrative agency to hear, try and determine a controversy affords the complaining party due process of law and the statute be upheld

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4. See Gen. A. F. & L. Assur. Corp. v. Industrial Con., 223 Wis. 635 (1937).
5. Dalstrom Metallic Door Co. v. Industrial Board, 284 U. S. 594 (0000).
6. See 11 Am. Jr. § 142 and cases cited.

SUMMATION OF THE CONFERENCE

Arrangement of the Program, Which Sets Forth Its Various Parts as "Problems" and not as Certainties, Solutions or Dogmas, Is a Cheering Manifestation of Intellectual Responsibility—Attitude Which One Takes toward the Necessity of the Legal Development Which We Call Administrative Law, of Particular Importance with Reference to All of the Issues Canvassed at Conference—New Social Forces Press for Attention and Call for Social Invention to Deal with Them, Just as the Rigidity of the Common Law Led to the Invention of Courts of Equity—Need of Procedural Safeguards—Time not Ripe for Broad Generalizations on Subject—Value of Such Conferences, etc.

By Felix Frankfurter
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Mr. Chief Justice, and Fellow Students: Considering the task that has been assigned to me, the committee on arrangements has shown characteristic relevance in holding this session in a night club. (Laughter) Think of what lies ahead of you and me if I am to do justice to the text,—the summation of these eight carefully divided parts of a vast field, contributed by nine thoughtful, uncommonly well prepared, if I may say so, speakers,—to summarize what they have said, to bring their thoughts together and then perchance to make some observations of my own. But on second thought, you will do well not to be nervous, to receive my threat of a night session with calm, because, after all, as to the things that have been well said, and some of them have been very well said, indeed, it would be worse than foolish for me to dilute by repetition, and as to the things that have been left unsaid, you hardly expect me to touch even the periphery of the problems in the time left before dinner.

Believe me, it is not merely the customary courtesy of a guest, that leads me to speak in warm appreciation of, and congratulation for, the quality of this Conference. First and last in a long life, one has to attend many conferences, but I do not recall one in which all the speakers kept so closely to their themes, and in which a vast general subject was so carefully analyzed in advance. Not only that, but I wonder if there is something in your climate, or in the grandeur of these surroundings, or in the great cultural traditions of Cincinnati that makes you do what I do not believe any body of students I have ever known anything about, either at Harvard or elsewhere, would do,—sit for five hours with such concentrated attention and such assiduous presence, interrupted by a frugal meal, (laughter) sit for five hours and closely follow what, after all, is a very complicated, difficult and to some extent recondite subject of law. I shall carry away a heartening sense from the fact that so large a gathering of the Bar can occupy itself for a whole day with these problems, conscious of the fact that these problems are still in the embryonic stage of development, and that nothing is so indispensable for their full unfolding, for their wise analysis, let alone their wise solution, as that members of the Bar, both young and old, should have a deep and concentrated awareness of their existence.

I was struck with your general designation of the themes of these eight papers,—"Problems presented to the Conference." It is a cheering manifestation of intellectual responsibility that subjects on which every columnist has dogmatic views, you find not things settled by formulas or clichés or hallowed slogans. To men who have thought about these things, such as the men who have arranged this program, and the men who have presented the various parts of the program, these matters are not certainties or solutions or formulas or dogmas. They are "*problems.*"

Where do these problems come from? What is the source of these problems? Like all difficult problems of the law, they are presented from without the law. Like all really hard nuts for lawyers and jurists to crack, they come from life, and are presented as difficulties to the law.

After all, what is law? It is nothing but a body of arrangements by which society adjusts in peace the inevitable conflicts of feelings and interests. And these conflicts do not derive from within the law, except when the law is not adequately responsive to the long-range needs of society; these conflicts derive from a shift in interests, in feelings, in attitudes, in the concerns of society. Therefore, the problems which have been presented to this Conference on that vast, still undefined series of questions which today we sum up as administrative law, are problems presented to judges, to lawyers, to administrators, to practitioners, and professors, by the enormous, transforming changes in society, due to the extraordinary development in the technological resources of society. And I should say the center of our difficulties is the failure, the perfectly natural failure, to adapt old formulas, our existing machinery, but above all, our traditional modes of thought, to the difficult problems presented by contemporary society to the whole framework of law, compared to the problems that were presented to the framework of law, say, even fifty years ago.

If I emphasize this part of it, and with some detail, I do so because of a profound conviction that in the solution of our difficulties, whether in law or econom-

ics, in the whole realm of the so-called sociological field, what matters most toward getting wise, fruitful, and, in the deep sense of the term, conservative solutions, that is, solutions which conserve the great values of civilization, is the mental climate, the atmosphere in which these problems are faced, and out of which solutions will eventually evolve.

President Vanderbilt used a phrase on which I could dwell for almost the time allotted to me. He said the tendency in England regarding administrative law "evoked the thunder of the Lord Chief Justice." He is quite right. It is a very happy characterization of Lord Hewart's book "The New Despotism." But I do not think we would think much of the wisdom of a great medical scientist who would deal with the difficulties of the human body by thundering about it. I do not believe maladjustments in the social structure are best dealt with by a raucous voice. Lord Hewart did thunder in a book that has long since received an almost indecent burial in England, but which is still quoted with reverence in this country. After all, even a Lord Chief Justice must have a little fun, and judges take their fun along lines which they know best. And you must not forget that Lord Hewart came to the bar rather late, and that before he was a lawyer, he was a journalist. This is not mere facetiousness, it is serious business, not only because Lord Hewart's book has had a wide circulation through some anonymous, benevolent distributors in this country, but also because the temper of mind revealed in his book is all too common in our own midst.

The essence of Lord Hewart's book was the suggestion,—I say suggestion, because almost instinctively in speaking of Englishmen I indulge in understatement, it was an accusation—that the bureaucracy of Whitehall conspired to aggrandize unto itself vast powers, so as to derogate from the authority of Parliament and the courts of law. Lord Hewart had given expression to such views at banquets and on various public occasions which received newspaper attention and had been re-echoed in the House of Commons. All this led to the appointment of a committee by the then Lord Chancellor, Lord Sankey, promptly on the appearance of Lord Hewart's book. The Report of the Committee on Ministers' Powers, which was an extraordinarily authoritative body, consisting of distinguished lawyers (one of them now a Lord Justice), eminent civil servants, members of Parliament, a few of the despised professors of political science, who seem less despised in that practical, John Bull country than in our own,—they do not like to exclude intellectuals altogether, they like to have them grace the practical feast, just a few fellows who know a little history, that is,—gave burial to Lord Hewart's book, because it once and for all put a quietus to the charge of Lord Hewart that this development in English history whereby vast powers were delegated to the Whitehall bureaucrats, both of so-called legislative and judicial character,—you remember Mr. Justice Holmes' remark "softened by a *quasi*," vast *quasi*-legislative and *quasi*-judicial powers,—had been the product of selfish aggrandizement or an expression of the lust for power. Whatever else might be relevant to the controversy raised by Lord Hewart, one thing was clear and emphatic in the judgment of the Lord Chancellor's Committee, that the bureaucrats were not weaving a web of power, that they were not the creators of power, but were the grantees of power conferred by Parliament and conferred for the simple reason that it could not help doing so. And that Report has powerfully educated British public opinion.

I think nothing is more important with reference to every one of the issues which were canvassed this forenoon, and this afternoon,—the relation between the administrative and the judiciary, the relation between the administrative and the legislative, what powers may be delegated, what powers should be delegated, what should be the nature and scope of judicial review, what procedure is appropriate within the administrative, should there be multiple heads or single heads, should there be a reviewing agency within this, that or the other department, etc., etc., etc.,—every one of those issues is in the ultimate analysis referable to the attitude you take toward the necessity of the legal development that we call administrative law.

If you think that administrative law is a denial of the common law, is hostile to it, betrays it, and should therefore be restricted as much as may be; if you believe not only that it should be, but that it will be; if you think that you and I or some political party can do something about it, then you will have one attitude toward these problems. If you take the attitude, however, which the Chief Justice of Wisconsin expressed in a few words (and as I told him, I thought I had a few things to say before he spoke, but I knew I had nothing to say after he had finished), if you take his attitude, namely, that we are confronting not some alien movement or some movement that grew up because we were not attentive to our liberties, but that we are in the presence of a movement as legitimate, as real, as powerful, as pervasive as the movement which led to the establishment of courts of equity alongside courts of common law, then you will have a different attitude toward every one of these questions, which call for the most painstaking,—I almost said painful,—the most rigorous, and, may I add the most important adjective of all, the most humble attitude toward working out the adjustments that have to be worked out.

About a hundred years ago, say when Queen Victoria came to the throne, the questions that concerned society were, in the main, not those economic and social difficulties which predominantly now concern the governments of England, Australia, Canada, South Africa and the United States. Even when Victoria reached the fiftieth year of her reign, certainly when she came to her silver jubilee, strictly political and international questions were still the dominant questions, rather than the controversies pertaining to the intervention of the state in economic fields. If you followed, as I know you did, the observations of President Vanderbilt, Colonel McGuire, Mr. Waite, Mr. Jacobs and the other gentlemen,—and I am taking the men who are on the firing line of practice or administration,—you will have noted that they referred, although they did not particularize,—there was not time for that,—to the effect of administration upon the economic process. They were primarily concerned with utility regulation, taxation, with the functions of the Securities and Exchange Commission, with the Wagner Labor Board—in a word, with the intervention of the 48 states, and of the federal government, within their respective spheres, in the economic scene.

That happened in England about a generation ahead of our time. It is not accidental. It pertains to the differences in social and economic factors in this country compared with the English situation. England es-

tablished a Railway and Canal Commission in 1854, and the Interstate Commerce Commission was not established until 1887. You could duplicate almost every branch of social or economic legislation in this country, and you will find England had the counterpart anywhere from 15 to 30 years before we did. The Railway and Canal Act of 1854, the first important taxation of inheritances, the Harcourt Budget of 1894,—again just about that difference,—The Workmen's Compensation Act, Unemployment Insurance, Old Age Pensions, every one of these activities of political society with which we are still worrying in this country, had its English counterpart anywhere from 15 to 30 years ago. These political and legal mumps that we are passing through, England had passed through some 20 or 30 years ago.

Of course the War greatly accelerated the business, but merely accelerated it. It was written in the stars of economic and social conditions. We had an Interstate Commerce Commission long before the War; the present Chief Justice led the fight for a public service commission in New York contemporaneous with the elder LaFollette's fight in Wisconsin. This great body of social economic legislation, put to Congress, to the legislatures and eventually to the courts, the problem that John Marshall, with his great practical sense, discerned more than a hundred years ago, namely, as to some legislations (and since the Chief Justice of Wisconsin refused to define what they are, you do not expect a mere professor to do so), full definition must be made by the legislature, but as to other things, the only way the legislatures can legislate effectively is to deposit power in administrative bodies. In that fact you already have most of the problems that were canvassed here today.

May I suggest at least a side light on what or when the legislatures will find it necessary to deposit power? The legislature will delegate power when it is so simple or so mechanical that it can leave it to somebody else; or, on the other extreme, when it is so complicated that the legislature cannot define it, where it takes care of a thousand variegated situations. In this situation you have the seed of the central problem of administrative law, namely, the conflict between rule and discretion. Out of that come most of our specific problems; how to delegate authority to exercise discretion, which raises the questions that were so admirably dealt with by Mr. Jacobs, Mr. Finkbeiner, Professor Lavery,—the internal proceedings; from it derive all the difficult relations of administrators to courts, that Mr. Vanderbilt in his large black and white study, —the judiciary being white, the administrative being black (laughter),—covered in a generous way, sweeping a wide orbit, as becomes the President of the American Bar Association. The Chief Justice of Wisconsin and Professor Stason faced the issues with admirable particularity, namely, what should be reviewed, what kind of control should be exercised over these administrative agencies, how should it be exercised, the scope and nature of what we call judicial review.

They are all embraced in the profound, pervasive fact set forth in the famous Macmillan report. (Lord Macmillan is in some ways the most distinguished of all present English judges, and like most famous Englishmen, he is a Scotchman.) Lord Macmillan, as head of the Royal Commission which investigated the economic, financial and industrial life of England, in 1931, laid down as the postulate of the Commission's inquiry, the fact that an enormous change had taken place in the outlook of the government of Great Britain, namely, that the government of Great Britain now is concerned with the positive promotion of the well-being of the common man, which was not true a hundred or even fifty years ago.

I am aware of the fact that England has no written constitution. The reason I take this flight to England every few minutes is because, so far as those safeguards of Anglo-Saxon liberty which are enshrined in our Bill of Rights are concerned, I venture to say that they are even more protected, although they have no written constitution, in England, than here. What the Englishman calls "the liberties of the subject" has a vitality, respect and daily observance in English life to which, I think, there is no parallel in this country. When a young woman was taken to Scotland Yard and subjected to the third degree, as happened in 1928, and the thing became known, there was a whole day's full dress debate in the House of Commons, and the Government had to set up an authoritative public inquiry to evolve safeguards against recurrence of the mischief. I must say it was not palatable for Americans to be told that they would not tolerate "the American system" of "Third degree." Again, very recently when two metropolitan constables in London by mischance arrested an innocent man and charged him with larceny, there followed a prompt suit for false imprisonment, and a verdict was brought in for 300 pounds, and heavy costs. Again the House of Commons manifested its concern, and the Home Secretary promised reformulation of the rules to avoid these mishaps in future.

What we protect through the due process clause, the English protect even more so, because their regard for the liberties of the subject is in their very bones. So that I mention the English situation, because it is wholly relevant to our problems. And if you have the vast delegation of power to the administrative and restrictive power of review, if you have such a situation in all English-speaking countries, then it puts a different face on our situation, and it underlines what Chief Justice Rosenberry said, namely, that we are dealing with something that is in the very necessities of our situation.

What is meant by saying that the present preoccupation of the British government is with the daily life of the people? As Lord Macmillan on another occasion explained it:

> "The statute book is always a good index of the economic and social policies of any period, and its recent contents evidence the extraordinary growth of what are now officially known as the 'Public Social Services.'
>
> "In contrast with former times Parliament now concerns itself with the regulation of the lives of the people from the cradle—indeed, even ante-natally—to the grave, and being unable itself to deal with all the details, it delegates to the Government departments the task of carrying out its policy by means of innumerable Statutory Rules and Orders."

Let me give you a figure that puts it in a nutshell. Some thirty years ago the per capita budget in England for the so-called social services was something like 7s. The latest figure in 1934 was £8.16.6 per capita for the expenditures of society for these services. It is out of these services, out of these regulations, out of these activities of society that come the problems of administrative law.

These new forces press for attention, and they call for social invention to deal with them, just as the

rigidity of the common law led to the invention of courts of equity. On the other hand, the whole history of Anglo-Saxon political liberty admonishes us of the need of safeguarding the exercise of power. I do not think myself that we have reached the stage where we can summarize the difficulties in simple or comprehending phrases, and therefore, I do not believe we have reached the stage where solutions of a grandiose, systematic nature are available.

When you have only half an hour, as Professor Stason had, to deal with methods of judicial relief, you cannot possibly do anything except what he did so admirably, deal with a few types of review. When one has only half an hour or so to deal with the problems that Colonel McGuire had to deal with, he necessarily had to give a large cross section instead of dealing with particularities. But by such summary treatment we do not escape the difficulty and the inadequacy of dealing with these subjects in the large. I am not criticising,—either the speakers or the program committee,—nothing is farther from my thought and I hope from my tongue. I am trying to analyze the nature of these problems, and I agree entirely with the Chief Justice from Wisconsin in saying that you have to get down to particulars.

Let me be specific myself. I think it is inevitable that you must be in an intellectual fog thus far,—I am not saying what may happen eventually,—if you talk about "judicial review" in the abstract. The English are so hopeful that they think they can do something eventually even about the fog of London. Certainly we are in the fog of "judicial review." I think we are in the fog of inadequate experience, we are as yet in a totally inadequate stage for suggesting wholesale remedies or large systems.

We heard nothing about postal regulation during the course of the day,—just a passing reference to immigration administration. Naturally enough, the preoccupations were with these vast impingements of government on business, the interplay of government and business. But let me give you two instances of the difference it makes what administrative agency you are dealing with. Judge Hutcheson of the Fifth Circuit, certainly one of the ablest of the circuit judges, wrote an opinion a few years ago in which he indulged in what might be called anticipatory plagiarism of Lord Hewart's vituperation against bureaucrats. He said in effect: "While I feel generally this way about centralized rule from Washington and unreviewable authority by administrative agencies, I don't feel that way about the postal authority in keeping frauds out of the mail, and, therefore, when it comes to postal orders, I have a very generous allowance toward unreviewable discretion by the administrator." Let me take another instance from one of the greatest judges of this time, Judge Hough of the Second Circuit Court of Appeals. He said in effect: "When I have before me a case on review from the Interstate Commerce Commission, almost instinctively I want to sustain their order. When I have before me a case to review of the Federal Trade Commission, almost instinctively I want to reverse it." Now, I think if the Chief Justice of Wisconsin would leave behind for his great grandchildren a record of his private views on some of the administrative agencies of Wisconsin, who knows but you might find that even in Wisconsin, with all its fine governmental traditions, even he might be predisposed toward one agency against another. I am quite ignorant of the matter, but it is remotely conceivable that that might be so.

Let me take a case just decided, to show you the danger of generalized solutions of what are individualized problems. Last Monday the Supreme Court handed down an opinion in *United States v. Griffin*. That was a case in which the Supreme Court had before it a suit by the receiver of the Georgia and Florida Railway Company for a claim under the Railway Mail Pay Act for carrying government mail. The statute provides that the Interstate Commerce Commission should fix the rate at which mail is to be carried. The mail freight rates on railroads are fixed by the I. C. C. The I. C. C. fixed the rate. The Railroad thought the rate was unjust, and so, under the well known urgent Deficiencies Act of 1913, it brought suit to review that order of the I. C. C.. As you know, the urgent Deficiencies Act requires a court of three judges, and allows direct review by the Supreme Court. Let me read to you from the unanimous opinion of the Supreme Court of the United States, two of the judges not sitting, and one of the judges agreeing in the result and fully with all of the opinion except one paragraph of it: "We at first thought"—for the case was twice argued,—"We at first thought that the District Court had jurisdiction, and ordered a reargument of the case on the merits. But upon further consideration of the jurisdictional question, we are of the opinion that the remedy provided by the urgent Deficiencies Act is not applicable to this order." The Court, in an exceedingly interesting opinion by Mr. Justice Brandeis, will make many of us, whose special job it is to know about this particular branch of the law, re-do our thinking. Happily, I do not have notes for my classes, so that I do not have to change my notes; but I certainly have to reconsider a good many cases, because the Court reconsidered and reinterpreted them—"We at first thought the District Court had jurisdiction." They concluded that this kind of rate-fixing by the Interstate Commerce Commission is not within the ordinary reviewing power of the courts over freight rates. Mr. Justice Brandeis notes that when Senator Cummins, who introduced the amendment withdrawing mail freight rates from the authority of the Postmaster General and placing it with the I. C. C., was asked about the scope of court review, he replied: "I think it would permit the same review there, to be precise, the same remedy under my amendment for the railroad companies that now exist for a private shipper. It is provided in the same way." The Supreme Court now gives the opposite construction. The Supreme Court with admirable candor admits that at first they reached the contrary result as did the court below. The opening sentence of the opinion is: "The sole question requiring decision is one of statutory construction." But the Court, as a mere matter of statutory language, could have gone one way as easily as the other. Why did they go the way they did? Because the Court felt that different considerations of policy governed the fixing of rates for mail carriage from those relevant to the fixing of freight rates.

When I came to the Bar, the tariff law then in effect was the McKinley Act of 1890. I remember one well known case that involved considerable money: "Was a tomato a fruit or vegetable under the Tariff Act?" The case was tried before the Board of General Appraisal, and was then re-tried before the Circuit Court. Your great law reformer, Chief Justice Taft, when he became President, put an end to that nonsense and said questions like that are not meet and fit for

courts, and they should be settled by administrative boards, for all practical purposes without review by courts.

In all these matters, the mental climate is of all pervading importance. It makes a great difference whether your habitation is in the common law courts, or whether it is in the new field of Anglo-American law. The latter is just as native, grows just as much out of the roots of our own Anglo-American society as courts of equity grew out of it. I got my general slant regarding public law in the Administration of the Cincinnati "New Deal." I mean, of course, in the Administration of President Taft. When in 1911 I went to Washington, some of the most far-reaching public problems came before administrative authorities. For instance, the Secretary of War, concerned with the administration of the Rivers and Harbors Act, had to pass on vast and complicated interests involved in the Chicago Sanitary District Controversy. The scope of judicial review in those cases is next to nothing. There must, of course, be conformity with the requirements under which the Secretary of War acted. But beyond that the Supreme Court has allowed the Secretary of War the widest powers, and if you will read the powerful brief of D. T. Watson, a considerable lawyer in his day, in the *Monongahela* case, 216 U. S., you will see that Mr. Watson raised every question in 1910, canvassed here today, and you will find an admirable reply brief by Lloyd Bowers, a great lawyer, Mr. Taft's Solicitor General. But none of the metaphysics about jurisdictional facts gave the Supreme Court any difficulty, because in the regulation of rivers and harbors the Congress had gone through a long period of experience, where they had first left it to the courts, in the *Wheeling Bridge Company* case, then left it to Congress by individual legislation, and finally said "This is not good government. You must deposit expert competence somewhere." And so they gave it to the Secretary of War, to be administered through the Engineers as the corps élite of the American Army.

I could give instance after instance to show the need for individualization of knowledge as against abstract generalizations, with reference to these exercises of modern governmental power. Chief Justice Rosenberry covered the situation with remarkable brevity when he gave the attitude of the Supreme Court toward valuation in utility cases as against the settled doctrine that value is a question of fact not subject to court review in taxation cases. Take the Babcock case in 204 U. S. 585, at 598, where Mr. Justice Holmes said, in effect, that the Court cannot sit as a revising body of tax assessors or tax boards of the state. And as for a charge of "arbitrariness", he said: "But the action does not appear to have been arbitrary except in the sense that many honest and sensible judgments are so. They express an intuition of experience that outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth."

What is the upshot of these general observations? I must have wearied you with reiteration of my chief point: it makes all the difference in the world whether you treat these problems in a friendly way, as problems to be solved, rather than as irritations to be resented. It makes all the difference in the world whether you regard them not as problems wilfully created by politicians, but as inevitable phases of the impact of science and technology upon society. Once you recognize that, once you face that issue with insight, with candor and humility, then it is up to us as professional students of society to bring our very special contributions to bear. For these are forces that must be responded to by government in some form.

But, in the process of responding to them, we should not throw the baby out with the bath. Remember, there are very precious values of civilization which ultimately, to a very large extent, are procedural in their nature. And the greatest assurance of sound procedure is a permanent, professional body of public servants, like the British Civil Service. All tribunals, administrative, or judicial, have to inquire and examine before they decide. Historic experience lies behind the right to a day in court, and a full day. Those who decide should record their judgments and give reasons for them, which in itself will have a fruitful psychological effect. You feel much more responsible,—all of us do,—if we have to sit down and write out why we think what we think. There is a famous instance in which Mr. Justice Pitney was originally charged with writing the opinion of the Court, but he finally reported to his Chief, "It won't write." Instead of that, he wrote an impressive dissenting opinion,—and a noble memorial it is to his memory. The reports, I think, of the Securities and Exchange Commission, the Wagner Board, and the Interstate Commerce Commission, will stand comparison with the reports of our historic courts.

If we have adequate procedural safeguards,—because practical and wise procedure has been the greatest safeguard of liberty,—then I think we had better not endeavor to generalize further. If it is dangerous in the natural sciences to generalize prematurely, it is even more dangerous to do so in the social sciences and in affairs of government. Mr. Justice Johnson, one of the ablest of the early members of the Supreme Court, said that Government is "the science of experiment." The reason I think that this program was admirably arranged in calling these things "problems", is that I believe that recognition of the early stage in which we find ourselves in administrative law is the first requisite to understanding. There is no fund of social knowledge ready to be tapped,—there is no wise man, he does not exist, to whom you can go for answers to these things. But it is by such interchange of minds that we have had here today, and by such eagerness and freedom of inquiry permeating the Bar and, through the Bar, the press and the laity, that we will eventually achieve that reconciliation of authority with liberty which is the priceless heritage of the Anglo-Saxon peoples. (Applause.)

A Prayer By Elihu Root

(From Memorial to Elihu Root, presented to New York State Bar Association, 1938.)

"In a letter to the press a few days after Mr. Root's death, Mr. Henry L. Stimson mentioned the prayer with which Mr. Root opened the New York Constitutional Convention on May 5, 1915, when the clergyman unexpectedly failed to come. Mr. Root then said:

" 'Almighty God, we pray to Thee to guide our deliberations this day. Make us humble, sincere, devoted to the public service. Make us wise, considerate of the feelings and the opinions and the rights of others. Make us effective and useful for the advancement of the cause of peace and justice and liberty in the world."

CINCINNATI CONFERENCE ON FUNCTIONS AND PROCEDURE OF ADMINISTRATIVE TRIBUNALS

By M. L. Ferson
Chairman of Committee on Conference; Dean of College of Law, University of Cincinnati

THE Cincinnati Conference held Saturday, March 5, was the fourth in a series that have been arranged or organized by the Cincinnati Bar Association under the auspices of the Ohio State Bar Association. The earlier conferences were devoted, respectively, to "The Selection and Tenure of Judges," "The Administration of Criminal Justice," and "Trial by Jury." This last one had to do with "Functions and Procedure of Administrative Tribunals." It, like the others, was a one day conference. The morning session extended from 10 A. M. to 12:30 P. M. Luncheon was served to the conferees in a room adjacent to the conference room. The afternoon session extended from 2:00 until 5:00 o'clock. Mr. Charles M. Leslie, President of the Cincinnati Bar Association, presided at the morning session, and Honorable Carl V. Weygandt, Chief Justice of the Ohio Supreme Court, presided at the afternoon session.

The general subject of the Conference had been broken down into specific problems by Professor E. Blythe Stason. The problems presented to the Conference, with the respective discussion leaders, were as follows:

I. The Place of the Administrative Tribunal in Our Legal System.
   a. The nature of the functions of administrative tribunals—partly administrative, partly legislative and partly judicial.
   b. Constitutional and practical objections to this union of governmental powers.
   Discussion leader: Honorable Arthur T. Vanderbilt.

II. Criticisms of the System of Administrative Tribunals.
   a. The work of the American Bar Association Special Committee on Administrative Law.
   b. The Report of the President's Committee on Administrative Managements.
   c. Comparison with the Report of the British Committee on Ministers Powers.
   Discussion leader: Colonel O. R. McGuire.

III. Inquisitorial Powers of Administrative Tribunals.
   a. When may the subpoena be used by administrative tribunals?
   b. What are the powers of such tribunals regarding the examination of books and records and the requiring of reports?
   c. Does the self incrimination clause protect against disclosures resulting from examination of books and records?
   Discussion leader: Mr. Morison R. Waite.

IV. The Essential Elements of a Fair Administrative Hearing.
   a. Is there too close a relationship between the officials pursuing inquiries into violations and those who decide cases disposed of by administrative tribunals?
   b. How should the burden of proof be fixed in cases of administrative action?
   c. How far should the doctrines of judicial notice be applicable?
   d. The preparation of the record and the requirement of written findings of fact.
   Discussion leaders: Mr. Donald Finkbeiner, Mr. Carl M. Jacobs, Jr.

V. Applicability of Common-Law Rules of Evidence Before Administrative Tribunals.
   a. To what extent do common-law rules apply before various types of tribunals?
   b. To what extent, if any, should the practice be changed?
   c. Should statutory provisions be adopted to bring about a relaxation of common-law rules?
   Discussion leader: Professor Thomas C. Lavery.

VI. Publication of Administrative Rules and Orders.
   a. The Federal Register Act and the publication of federal rules and orders.
   b. Should the decision and rules of various state tribunals be given wider publicity than at present? If so, by what method?
   Discussion leader: Mr. Lester A. Jaffe.

VII. Methods of Judicial Relief from Administrative Action.
   a. Tort liability of administrative officers.
   b. Availability and scope of the "extraordinary legal remedies" in Ohio.
   c. Federal injunction against state administrative action—the Johnson Act.
   Discussion leader: Professor E. Blythe Stason, *University of Michigan Law School.*

VIII. Power of the Courts to Set Aside Administrative Rules and Orders.
   a. In what types of cases will courts interfere—distinction between justiciable and non-justiciable questions.
   b. What is a question of fact?
   c. Of law?
   d. Of constitutional right?
   e. Of jurisdictional fact? (Crowell v. Benson).
   Discussion leader Honorable Marvin B. Rosenberry, *Chief Justice Wisconsin Supreme Court.*

A Summation of the Conference
   By Professor Felix Frankfurter of the *Harvard Law School.*

Back of the Cincinnati conferences is a theory. It is this: Problems of government call for group study and a new technique; individual efforts are not adequate and the methods of science will not suffice. The solitary scientist working in his laboratory may, for

instance, be able to discover the germ of a particular disease, and how to combat it. He needs only the physical substances at hand to check his results. A problem in government, however, cannot be solved in the laboratory, or by a solitary scholar. It calls for the impact and reactions of many minds.

Another difference is that the work of the scientist is complete when he makes his discovery. His solution is demonstrable; it will be utilized. Not so the conclusion of a solitary scholar in governmental problems. His solution is not demonstrable. His idea, however sound, amounts to nothing until it is galvanized. It fails unless it has the prestige and support of an influential group. It must be "Sold." Each Cincinnati Conference has accordingly been designed to: in the first place, procure group study of a live problem; and, in the second place, to enlist the interest and support of the persons who attend the conference.

The features of the plan according to which the Cincinnati Conferences have been set up and conducted are as follows:

1. The program for a Conference is worked out some time in advance and with care, as Professor Stason worked out the last one. The general subject is broken down into sub-topics that throw into relief the basic issues of the problem. This breakdown affords a series of outlines for the respective discussion leaders and points to the preparation that should be made by persons who will attend. It prevents the speakers from overlapping and brings their ideas to a focus. The result is a comprehensive and coherent study of the general subject.

2. The group invited to the conferences have been persons who were qualified by their study or experience to speak on the problems. Five of the seven members of the Ohio Supreme Court attended the last Conference. Divergent viewpoints have been brought to the conferences; but the discussion leaders chosen were men who could be depended on to proceed from a factual basis logically and temperately to a conclusion.

3. One or two discussion leaders were engaged for each sub-topic. These have, in all the conferences, been prominent and scholarly men. The late Newton D. Baker was among those who participated in the first Conference. The Honorable Arthur T. Vanderbilt and Professor Felix Frankfurter participated in the last one. Chief Justice Weygandt of the Ohio Supreme Court, and Chief Justice Rosenberry of the Wisconsin Supreme Court, also took prominent parts. The discussion leaders on a given sub-topic have, in some instances, held opposing views. The aim has been to get a broad-minded and scientific consideration of the problems.

4. A definite amount of time has been allocated to each sub-topic. This encourages the discussion leaders, and others who participate, to come to the point. It is unnecessary for them to embellish or emotionalize their arguments in this kind of a meeting.

5. The discussion leaders are responsible for the development of their respective sub-topics; and others in attendance participate so far as time permits.

6. The physical set-up is made characteristic of a conference: The discussion leaders are seated at a conference table in the center of the room. Each one rises when he is to speak and takes a place near the head of the table. Other persons attending the conference are seated back from the table and in the balcony.

7. A form of questionnaire has been prepared in advance of each conference relating to the issues to be discussed. Each person in attendance was expected to fill out a questionnaire. A tabulation of the answers gives the composite opinions of the Conference.

8. This plan, in four years' trial, has resulted in conferences that were interesting and fruitful. It keeps the discussion within bounds, to a purpose, and coherent. It secures coverage of the many phases of the general subject and tends the Conference toward a conclusion on the main point. It sifts the arguments for and against given proposals; and the ideas on which there is agreement come out of the conference with prestige and support.

The Cincinnati conferences have not only made contribution to the subject matters discussed; they have been also an interesting educational experiment—a new technique applied to problems of law and government.

TABULATION AND ANALYSIS OF QUESTIONNAIRES

By Richard W. Barrett
of the Cincinnati Bar

A QUESTIONNAIRE prepared by Professor E. Blythe Stason, of the University of Michigan, was distributed among those who attended the Conference. The questions call for opinions on a good many of the debatable issues with reference to the growth and procedure of Administrative Tribunals. Fifty-two of these questionnaires were filled in with considerable care by persons attending the conference.[1] These questionnaires brought out the opinions of judges, lawyers, law school professors, and political scientists. The lawyers included practitioners before the Board of Tax Appeals, Federal Trade Commission, Interstate Commerce Commission, National Labor Relations Board, United States Customs Court, Division of Insurance of Ohio, Industrial Commission of Ohio, Public Utilities Commission of Ohio, Tax Commission of Ohio, Indiana Workmen's Compensation Commission, and the Commerce Commission of Illinois.

The answers will be summarized. It may be noted at the outset that the verdict of the Conference was clear on two important questions: first, the advantages of administrative tribunals outweigh the objections to them; and, second, the difficulty with administrative tribunals is to secure competent and unbiased administrators. The questions asked will be repeated in this summary together with the categorical answers. Other answers being incapable of tabulation will be included in the footnotes.

I. The Place of the Administrative Tribunal in Our Legal System.

1. Do you feel that the *constitutional* objections to the union in the administrative tribunal of executive, legislative and judicial powers outweigh the *practical* advantages gained by the concentration of power, so that the use of the tribunal should be limited to cases of clear necessity? No—30;[2] Yes—22.

2. Do you feel that the *practical* objections to this union of functions outweigh the *practical* advantages, so that the use of the tribunal should be limited to cases of clear necessity? No—29; Yes—22.

3. Do you believe that personnel can be secured sufficiently unbiased and competent to be entrusted with the three powers of government in highly controversial areas

1. The attendance was estimated at 400. There were 386 registrations for the Conference.

2. One answer says "There are no constitutional objections to the union of the executive, legislative, and judicial powers."

of administrative action? Yes—19; No—17; Doubtful —11.

After the many hostile criticisms that have been leveled at administrative tribunals, it is surprising to find that the majority approved of them in spite of the constitutional and practical objections. This conclusion is more surprising when we take into consideration the conference's answer to the third question—that it is at least doubtful if a personnel sufficiently unbiased and competent can be secured to be entrusted with the powers of the three branches of government.

II. CRITICISMS OF THE SYSTEMS OF ADMINISTRATIVE TRIBUNALS.

1. What phase of the present system of federal administrative tribunals can the American Bar Association's Special Committee on Administrative Law most profitably seek to improve? Personnel—11; Review of Administrative Action—8; Improve Procedure—6; Separation of Judicial Power from the Legislative and Executive Powers —5; Secure Greater Independence for the Administrators from the Control of Executive Branch—3; Education of the Public and the Bar—2; Publication of Rules and Orders—2.[3]

2. Does the Report of the President's Committee on Administrative Management offer a practical solution of the problem of the independent administrative tribunal? No—21; Yes—4.

Many of the questionnaires were returned with the second question in this group unanswered, some stating that they were not familiar with the report of the President's Committee.

III. INQUISITORIAL POWERS OF ADMINISTRATIVE TRIBUNALS.

1. Should the administrative tribunal be given the power of subpoena and the power to examine books and records in other cases than actual litigated controversies? No—33; Yes—20.

2. Is the objection of clients to the use of subpoena and the compulsory investigatory powers by administrative agencies based upon

(a) Emotional distaste for inquisitorial processes? Yes—33;[4] No—6.

(b) Practical considerations, such as fear of revelation of trade secrets, etc? Yes—24;[5] No—5.

(c) Disruption of office routine? Yes—24;[6] No—11.

(d) Other causes, naming them?—General feeling of distrust of governmental investigations—6; Fear that the investigation will reveal violations of law—3; Undue meddling in business—3; Purposes usually political—3; Unwarranted expense and trouble in making out and sending in reports—2; Autocratic attitude of the investigators—2.

The answers to the first question point to the expected conclusions—the public does not look with favor upon any governmental interference with its business activities. However, one of the questionnaires stated "The client himself never has any objections, they are always made for him by the lawyer."

IV. THE ESSENTIAL ELEMENTS OF A FAIR HEARING.

1. Is it psychologically unlikely that an unbiased attitude will be found in the tribunal trying the controversies if the same tribunal is responsible for initiating inquiries into and prosecuting violations? Yes—35; No—7.[7]

2. Should the record prepared before the administrative tribunal be the sole record on appeal, or should the parties be permitted to present additional testimony before the appellate court?—Parties should be permitted to present additional testimony before the Appellate Court—24; The record prepared before the administrative tribunal should be the sole record on appeal—20.[8]

V. APPLICABILITY OF COMMON LAW RULES OF EVIDENCE BEFORE ADMINISTRATIVE TRIBUNALS.

1. Judging from your experience, is it practicable to require administrative tribunals to adhere to the common law rules concerning hearsay testimony? Yes—25; No —24.[9]

2. Before what specific administrative tribunals do you believe that common law rules as to hearsay can safely be relaxed? All—8; None—6; Industrial Commission—5; Public Utilities Commission—5; Tax Commission—3; National Labor Relations Board—3; Federal Trade Commission—1.

The answers to the first question were almost equally divided—one more than half being in favor of relaxing the rule against hearsay testimony, the other half being in favor of its application. The Bar is not ready as yet to discard the hearsay rule. It is possible that the reason for this reluctance is the conviction that the personnel of the tribunals is not as yet capable or experienced enough to determine the proper probative effect that should be given to hearsay statements. Only 8 votes were recorded for relaxing the hearsay rule for all administrative tribunals. Some answers indicated that the trouble they experienced was a failure to apply the same rules of evidence to both parties in the case, or a complete failure to apply any rules of evidence.

VI. THE PUBLICATION OF ADMINISTRATIVE RULES AND ORDERS.

1. Do you subscribe to or have regular access to the Federal Register? No—33; Yes—21.

2. If your answer to the preceding question is affirmative, what specific improvements in the Register can you suggest? Improved indexes—10; Improved digests—5; Mr. Jaffe's recommendation approved—6; Should carry more Treasury Department items—1.

3. Should provision be made for more adequate publication of rulings and orders of Ohio administrative agencies? Yes—42.

It is significant to note that everyone is agreed that in Ohio provision should be made for more adequate publications of rulings and orders.

VII. METHODS OF JUDICIAL RELIEF FROM ADMINISTRATIVE ACTION.

1. Assuming a federal question to be present, do you feel that the federal *district* courts should be open to persons aggrieved by state administrative action? Or should initial resort be had to state judicial tribunals?—Federal district courts should be open to persons aggrieved by state administrative action—26; Initial resort should be to state judicial tribunals.[10]—23.

VIII. POWERS OF COURT TO SET ASIDE ADMINISTRATIVE RULES AND ORDERS

Answer the following questions with respect to some administrative tribunal the procedure of which is familiar to you. Name of the tribunal?—The procedure before the Industrial Commission of Ohio was familiar to the largest number of persons answering this group of questions. Thirteen of the answers were based upon experience before that Commission.

1. Should court review take the form of a trial *de*

3. "Permit only lawyers to practice before administrative tribunals"—1; "National Labor Relations Board"—1; "Declaratory rulings"—1; "Better settlement facilities"—1; "Eliminate the general impression held by our legislatures that the administrative tribunal is the solution to every social and economic problem"—1.

4. "Partly"—5; "perhaps"—2.

5. "Sometimes"—7; "often"—3; "secondarily"—1.

6. "To some extent"—2.

7. "This difficulty can be eliminated by proper administrative set-up"—1. "All depends upon the individual"—1.

8. "This question should be left to the discretion of the appellate court"—3. "The answer depends upon the integrity of the tribunal and the rules of evidence it applies"—1.

9. "Not strictly"—2; "Yes, except in rate making matters"—1.

10. "Answer depends upon the tribunal"—1; "answer depends upon the questions involved"—1.

novo or should it be based upon the record prepared by the tribunal?—Based upon the record—8; Trial *de novo*—5.

2. Should the reviewing court be the highest appellate court, or should it be the trial court in the jurisdiction?—Should be the highest appellate court—7; Should be the trial court in the jurisdiction—6.

3. Should the decision of the administrative tribunal be conclusive on the facts at issue if supported by competent evidence, or should the court have power to pass independently upon the facts?—The court should have power to pass independently upon the facts—9; The decision of the administrative tribunal should be conclusive on the facts—4.

The answers to the questions in Group VIII were based upon the experience of the members of the Conference before the Industrial Commission of Ohio, Federal Trade Commission, National Labor Relations Board, Board of Tax Appeals, Interstate Commerce Commission, Public Utilities Commission of Ohio, United States Customs Court, the Division of Insurance of the State of Ohio. Totalling all of the answers to the three questions we reach the following conclusions:

1. A review based upon the record prepared by the tribunal is preferred to a trial *de novo* by a vote of 39 to 11.

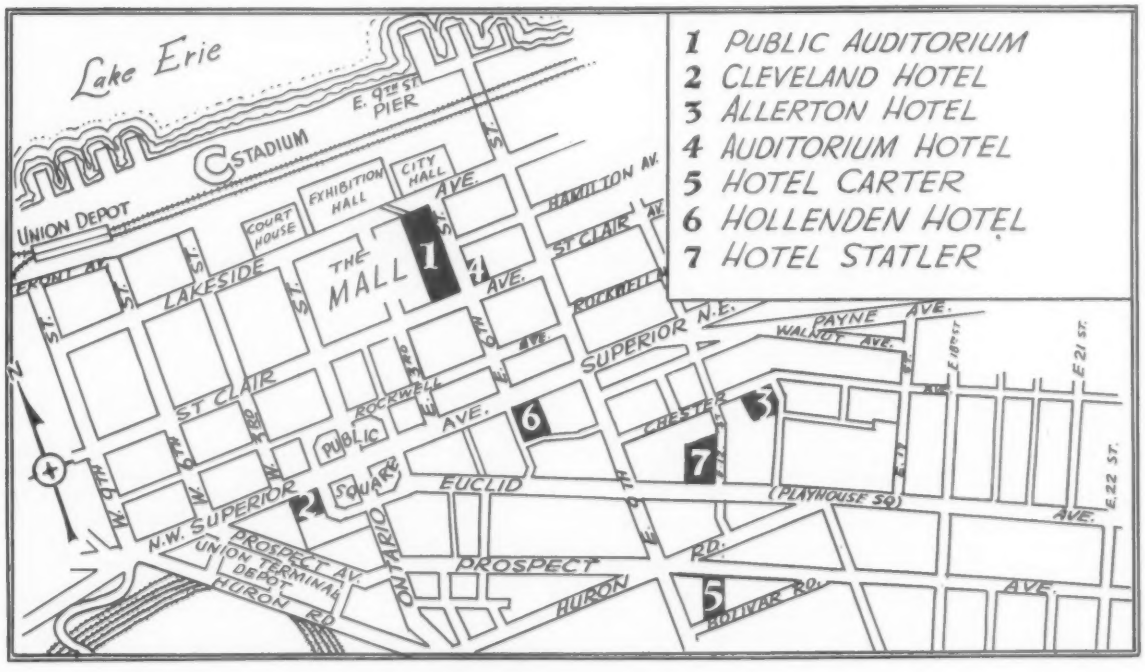
2. The reviewing court should be the highest appellate court rather than the trial court in the jurisdiction—by a vote of 23 to 21.

3. The reviewing court should have power to pass independently upon the facts rather than to be bound by a decision of the administrative tribunal based upon competent evidence—by a vote of 26 to 17.

All of the answers indicated that a review upon the record was preferred to a trial *de novo*, except in cases of review of action of the Interstate Commerce Commission and the Division of Insurance of Ohio. A review by the highest appellate court was preferred to a review by the trial court in all cases excepting review of action of the Interstate Commerce Commission, the National Labor Relations Board, Tax Commission of Ohio, and the Division of Insurance of Ohio. Only in the case of the Board of Tax Appeal did the answers indicate that the decision of the tribunal should be conclusive on the facts if supported by competent evidence.

CONCLUSION

The administrative tribunal deserves a place in our legal system. Its advantages outweigh the constitutional and practical objection. One of the chief practical objections is the lack of available personnel sufficiently competent to be entrusted with great responsibility, a problem meriting the attention of the American Bar Association's Special Committee. Few people feel that the Report of the President's Committee offers a practical solution to the problem of the administrative tribunal. Clients dislike to be subjected to the inquisitorial powers of the tribunals, but cannot agree upon their reasons for this dislike. The Bar feels that these powers should not be granted to the tribunals in cases other than actual litigated controversies. A single tribunal that is made to function as both judge and advocate is apt to be biased. The hearsay rule should not be discarded by the tribunals. A thorough index and digest must be added to the Federal Register to make that publication an efficient legal tool. Provision should be made for more adequate publication of rulings and orders of Ohio administrative agencies. Litigants should be able to appeal to the highest appellate court, which should pass independently upon the facts contained in a record prepared before the tribunal and supplemented by additional testimony presented in the appellate court. The Federal district court should be open to persons aggrieved by state administrative action.



MAP OF DOWN-TOWN CLEVELAND

(*For Hotel rates and other information see page* 337.)

CLEVELAND: PRODUCT OF VISION AND CAPACITY

City Which Will Act as Host to Association's Annual Meeting in 1938 One of the Great Industrial Centers of the World—Leads in Important Manufacturing Lines—Transportation Facilities—Largest Airport in the Country—Long Recognized as an Outstanding Cultural Center—Well Known Institutions of Learning Located There—Treasures in Museum of Art—The Leaders of Other Years Who Helped Lay Firm the Foundations of City's Present Greatness—History a Story of Dreams Mixed with Ability to Realize Them—Come and See!

By Cary R. Alburn
Member of the Cleveland Bar

STUDENTS of the Roman Law of Succession in the days of Justinian are familiar with the maxim "Uxor familiae et initium et finis est."

Mutatis mutandi as applied to the history of Cleveland, the word "lawyer" well might be substituted for "uxor". For Moses Cleaveland, the progenitor of Cleveland who founded it in 1796, was a New England lawyer. So was Alfred Kelley, the first President of the Village of Cleveland in 1815, who three years later as the youngest member of the Ohio Legislature was the author of the first bill to abolish imprisonment for debt ever presented to a legislative body. John M. Willey, the first Mayor of the City of Cleveland in 1836, was a lawyer. And today, after recently passing through the Slough of Despond, the City of Cleveland has regained her proud title of "The City on a Hill" as a direct result of the Herculean efforts of her capable and high-minded lawyer Mayor, Harold H. Burton. Like the "uxor" in Roman Law, distinguished Cleveland lawyers have initiated new life in the body politic and have been the last in the line of succession to inherit corporeal rewards.

Business and Business Facilities

Cleveland, midway between New York and Chicago, is situated on the south shore of Lake Erie. Cooling breezes add to her countless points of interest in attracting more Summer visitors each year. She is America's sixth city in population, fourth in industrial production and the center of a great Trade Empire. Within 500 miles are 55% of the population of the United States and Canada and 47 of the nation's eighty-one principal market centers. She is the gateway at which meet the iron ore from Lake Superior and the coal from Pennsylvania and West Virginia. Her harbor is one of the finest on the Great Lakes. Huge industrial plants, towering skyscrapers and civic improvements have boosted the value of her Public Square from $1.76 in 1795, when purchased from The Connecticut Land Company, to at least $20,000,000 at the present time. Her fourteen miles of protected docks enable her to handle annually tonnage greater than that of Liverpool or of all of the ports of France. Freight by rail in and out of Cleveland totals 25,000,000 tons each year. Seventeen miles of electrified railroad lines converge in her Union Terminal, which includes in its $100,000,000 development on the Public Square, a passenger depot for suburban and nation-wide railroad traffic. Her 1,040 acre airport is the largest in size and hangar equipment in the United States, and second only to Chicago in number of ships using it.

In Cleveland 3000 plants with 140,000 wage earners normally manufacture a billion dollars worth of products annually. Iron and steel, of course, have been Cleveland's major industries for more than a hundred years and she is now the alloy steel capital of America. Her plants represent two-thirds of the nation's industries. Cleveland leads the world in the production of wire nails, bolts and screws, malleable castings and heavy machinery. Here two of the world's largest paint companies maintain administrative offices and plants. Her output of refined oils is over a billion gallons each year. She is one of the nation's largest hardware centers. She ranks first in the manufacture of multigraphing machines and second in sewing machines. Her annual output of motor vehicles is over $150,000,000; of foundry and machine shop products $127,000,000; and of electrical machinery, apparatus and supplies $60,000,000, with an equal amount for brick and tile. More than $70,000,000 worth of men's clothing and women's garments and knit goods are produced here annually. Her exports and her imports to and from all parts of the world each exceed $200,000,000 per year. Her retail shops do an extensive business throughout the middle West.

City an Outstanding Cultural Center

Cleveland has long been recognized as an outstanding cultural center. At University Circle on Euclid Avenue is Western Reserve University, with an enrollment of 15,000 students, its Adelbert College founded in 1826, Mather College for Women, its Law, Medical, Graduate and other Schools, and its unique downtown branch for adult education known as Cleveland College. Adjoining its campus on one side and affiliated with its Medical School is the $13,000,000 University Hospitals' Group, including Babies' and Childrens' Hospital, Maternity Hospital and Lakeside Hospital. On its other side is Case School of Applied Science, one of the nation's best Engineering Schools, with 750 students in civil, mechanical, electrical, mining, metallurgical and chemical engineering courses. Opposite in Wade Park is beautiful Severance Hall, named from its donor John L. Severance, home of Cleveland's renowned Symphony Orchestra. Near by in Wade Park is Cleveland's lovely Museum of Art, with Rodin's "The Thinker" at the entrance and his "Man of the Age of Bronze" on display in the rotunda near the greatest single accession to the Museum, "Holy Family

with St. Margaret and St. John" by Filippino Lippi. Here is the magnificent "Sacrifice of Abraham" by Andrea del Sarto and some of the best work of other famous masters; the priceless Guelph treasures; medieval ivories, rock crystal and enamels; laces, brocades, velvets; and the Perseus and Andromeda Tapestry, heirloom of the 15th Century. These and countless other treasures delight the discerning visitor and add to the cultural appreciation of the 500 to 700 children who attend Cleveland's Museum of Art each week.

Space forbids more than passing mention of other great educational and cultural institutions such as John Carroll University, with its emphasis on the Classics and its seismological laboratory; the Museum of Natural History, with its display of Ohio birds and its wealth of African, Indian and Eskimo material; the Cleveland Public Library, which serves 8,000,000 visitors each year and where 9½ million books are borrowed from the library annually; and such nationally known secondary schools as University School for boys, Hathaway Brown School and Laurel School for girls and Shaker and Cleveland Heights High Schools.

Community Fund Model for Nation

Outstanding too are Cleveland's Community Fund, which serves as a model for the nation; her suburb Shaker Heights, former home of the Shakers and now a city of beautiful homes; her admirable hotels, including the Cleveland Hotel, headquarters for the 1938 Convention of the American Bar Association; her bus and street railway system; her Group Plan of Public buildings within two minutes of the Public Square, including the world's finest auditorium, the City Hall and the Court House, already representing an expenditure of $30,000,000; her Monument to President Garfield and the monuments of Tom L. Johnson and Kossuth; her miles of Lake Front; her Federal Reserve Bank building; her Western Reserve Historical Museum at University Circle; her splendid churches; and her unique Metropolitan Park system, with 90 miles of charming nature trails, bridle paths and picnic grounds and a dozen or more beautiful public and private golf courses nearby. Among the private golf clubs, Mayfield, Country, Kirtland, Canterbury, Shaker and Manakiki deserve special mention.

The cosmopolitan character of the population of Metropolitan Cleveland is indicated by the fact that among its 1,200,000 residents, 115,000 or their ancestors hail from the British Empire, 100,000 from Germany, 102,000 from Czechoslovakia, 89,000 from Poland, 59,000 from Italy, 42,000 from Hungary, and many from other lands.

Cleveland's Great Leaders of the Past

A few of the men now deceased who have helped in large measure to develop the resources of Cleveland and make it the fine place to live which it is today are Nathan Perry, "Cleveland's first greater merchant" and Senator H. B. Payne, bank president, who together built the Perry-Payne Building; Manuel Halle, the forerunner of The Halle Brothers Company, one of Cleveland's leading stores for men's and women's wearing apparel; Webb C. Ball, jeweller, who for a quarter of a century furnished the official time on every train of a large group of railroads; John D. Rockefeller, founder of The Standard Oil Company; Myron T. Herrick, long President of the Society for Savings Bank, Governor of Ohio and Ambassador to France during the World War; Samuel L. Mather, steel magnate and philanthropist; Harry A. Garfield, organizer of the Municipal League, now Citizens League, who later was president of Williams College; Frederick H. Goff, able lawyer and banker and originator of the Cleveland Foundation plan whereby wealth may be dedicated to "such public charitable or educational uses as will, in the absolute and uncontrolled discretion of the Committee, most effectively assist and promote the well-being of the inhabitants of the community comprising the city of Cleveland and its vicinity, or . . . of the State of Ohio . . . regardless of race, color or creed"; Charles F. Brush, inventor of the arc light and father of the electrical industry of Cleveland; Alexander Winton, inventor and pioneer auto and engine builder; Worcester Warner and Ambrose Swasey, pioneer machine tool makers and builders of the famous Yerkes and numerous other telescopes; Caesar A. Grasselli head of The Grasselli Chemical Company, who with Oliver M. Stafford, President of The Cleveland Worsted Mills Company, organized The Woodland Avenue Savings and Trust Company and The Broadway Savings and Trust Company; Colonel J. J. Sullivan, Chairman of the Board of the Central National Bank.

There was the great civic leader and mayor of Cleveland, Tom L. Johnson, on whose superb bronze statue in the Public Square is inscribed:

"He found us groping, leaderless and blind
He left a city with a civic mind."

There was Judge Robert W. Tayler, author of the Tayler Franchise, under which for twenty-five years Cleveland has enjoyed splendid street railway service at cost plus 6% to the stockholders.

There was Newton D. Baker, scholar, orator, statesman, City Solicitor under Mayor Tom L. Johnson and later himself mayor of Cleveland, illustrious as Secretary of War in the World War.

Here also lived Rufus P. Ranney, great Chief Justice of the Ohio Supreme Court; Harvey B. Goulder, noted admiralty lawyer; and such giants of the Bar as James H. Hoyt, Virgil P. Kline, J. P. Dawley, M. B. Johnson, Andrew Squire and Frank H. Ginn.

Nor will Cleveland ever forget the noble educator, friend and confidante of every student, Dr. Charles F. Thwing, who for more than 30 years as President and President Emeritus of Western Reserve University guided the destiny of that great institution of higher learning.

A Story of Vision and Capacity Combined

The story of Cleveland is too big to compass in a single article or in a dozen articles. It is the story of men of vision with capacity to realize their dreams. Blest with an unexcelled strategic location on the waters of Lake Erie, midway between the ore of the North and the coal and limestone of the South and East, she is the center of a great Trade Empire. Known as the Forest City, she is also the city of homes. A leader in progressive and adult education, she has used her great industries as stepping stones to a fuller life for her citizens—morally, intellectually, financially. It is significant that Cleveland's City Club Gridiron each year attracts to the Music Hall in Cleveland's Public Auditorium 4,000 stalwart citizens and officials from throughout Ohio who can take it on the chin. In an age of autocracy she refuses to impoverish or to coddle her citizens, but with an independence and foresight increasingly rare she is building upon the established foundations of the past.

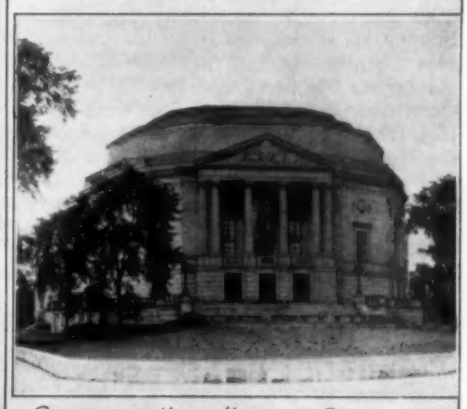
But to realize her value you *must* come to Cleveland!

The lawyers of Cleveland cordially invite all the members of the American Bar Association and their families to meet them at the next annual convention on July 25-29, 1938, in Cleveland.

STATUE of GENERAL MOSES CLEAVELAND, FOUNDER of CITY

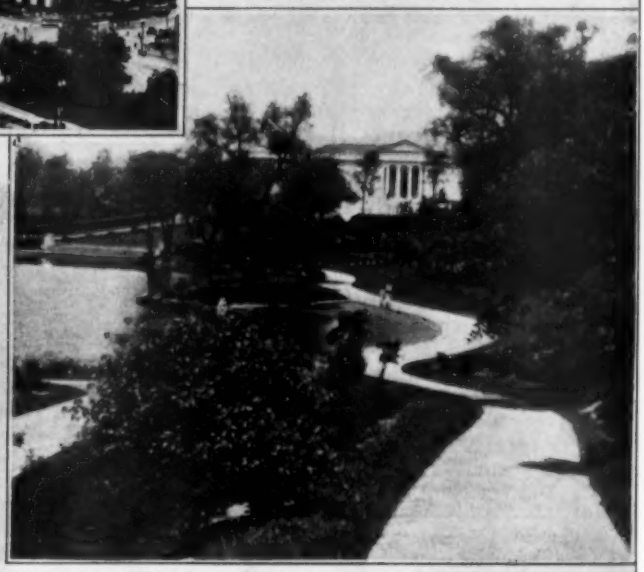
PUBLIC AUDITORIUM

TERMINAL TOWER GROUP



SEVERANCE HALL - HOME OF CLEVELAND ORCHESTRA

CUYAHOGA COUNTY COURT HOUSE



CLEVELAND MUSEUM OF ART

THE "UNAUTHORIZED PRACTICE OF LAW CONTROVERSY:" A SYMPOSIUM

COMMENT BY WILL SHAFROTH

THE "Unauthorized Practice of Law" Controversy, discussed for 64 pages in the winter edition of Duke University Law School's "Law and Contemporary Problems,"* contains a great amount of interesting material for the lawyer, and every one of the two thousand odd members of unauthorized practice committees, as well as the officials who are responsible for the direction of bar activities, should read it. Here for the first time under one cover are collected the thoughts of the leaders of the bar in this subject, together with a representation of the point of view of three lay agencies and a concise review of the law on particular phases.

The table of contents reads like a blue book of those whose experience with unauthorized practice entitles them to be considered the élite of this field. Stanley B. Houck and John G. Jackson, present and past Chairmen of the American Bar Association Unauthorized Practice Committee; Edwin M. Otterbourg, Chairman of the active and efficient committee of the New York County Lawyers Association; Charles Leviton, general counsel of the Chicago Bar Association; and Boyle G. Clark, Chairman of the Bar Committees of Missouri; have all had wide experience in this activity. Paul Sanders, Assistant Professor of Law of Duke University, who was the editor of the publication and author of one of the articles, is exceedingly well equipped for his task. For two years he worked with the American Bar Association on the National Bar Program, concerned to a considerable extent with the work of the Unauthorized Practice of the Law Committee of the national association and with the editing of its publication, "Unauthorized Practice News." His organization of the discussion is very well done and his choice of authors has been a most happy one.

The discussion centers around the three fields of automobile club activities, collection agencies, and the drafting of real estate instruments. There is also a discussion of the activities of corporate fiduciaries, of appearances by laymen before administrative bodies, and an article on the effect of unauthorized practice upon legal ethics. Not the least valuable are the three contributions by students from the law school reviewing the decisions to date in the three particular controversies discussed and the comprehensive article by Sanders on procedures for the suppression of unauthorized practice which, in itself, makes the booklet a valuable working tool.

First place in interest must be given to the article from the fiery pen of Karl Llewellyn of Columbia. In it are many things to which a lawyer may object. In pungent paragraphs he pokes, he pricks and he punctures. Sometimes he sledge-hammers. Read Llewellyn first. And read him last. His thesis in essence is that the bar must meet lay competition by giving better service than the layman and by letting the world know of it. Many lawyers will disagree with this thesis. A great deal of his article is concerned with a side-issue, the organization of legal service bureaus to take care of small potential law business. But he writes in a stimulating, thought-provoking way. And it is obvious that since the bar's activity in suppressing unauthorized practice must be based on the public welfare, the question of what is supplied in place of what is forbidden is a pertinent one.

The less controversial phases of unauthorized practice are only lightly touched upon in the symposium. It has become obvious, even to the bankers themselves in recent years, that they have such an interest in what goes into a client's will that they are not the proper agencies to draft it. It is equally clear that the layman and the corporation who are subject to no ethical restraints, have met no standards of preparation and have shown no qualifications, are a distinct menace to the public when they attempt to handle ordinary legal business. The court decisions have so held with practical unanimity.

Mr. Jackson tells in an interesting way of the eslishment of cordial relations between the bar and the corporate fiduciaries by the mutual acceptance of satisfactorily operating declarations of principles, from which he concludes: "The steady decrease in litigation between the two indicates not only a cordial relationship but also that the relationship rests on the sound foundation of recognition by each of their respective rights and of their duties to the public." Mr. Jackson tersely rebuts the argument that the bar's activity along this line is selfish. "Laymen," he says, "and, indeed, certain lawyers, are apt to view the work of a committee on the unauthorized practice of the law as one of self-preservation for the benefit of the bar alone, but this view is completely wrong and without logical support. As a matter of fact, legal services rendered by or under the direction of laymen are more likely than not to create work for lawyers."

The "controversy" as to unauthorized practice comes in special cases where it is claimed that laymen do a better job than lawyers and therefore it is in the public interest that they should continue to do legal business. Of course the laymen claim that what they do is not the practice of law, but actually there is little room for dispute on that ground. It should constantly be borne in mind, however, that each situation is deserving of individual treatment and that every case where practice of law is involved, as, for example, the case of the legal aid clinic, is not necessarily one for attack by the bar.

The first subject discussed is that of the automobile clubs. The answer of Mr. Collins, Professor of Law at Southeastern University in Washington, D. C., in behalf of the clubs, fails to come to grips with the real issue which is whether there is social justification for permitting the automobile clubs to practice law in a certain limited way. Mr. Leviton, in behalf of the bar, presents a legalistic argument which is sound but which does not answer the test of public convenience. True he points out the abuses which have occurred. It is equally true that one way to stop such abuses is to prevent any practice of law whatsoever by the clubs.

*Law and Contemporary Problems, Vol. V, No. 1; School of Law Duke University, Duke Station, Durham, N. C.

Many of these so-called clubs have been shown to be rackets, financially and fundamentally unsound. The bar has done a praise-worthy job in stopping them. As to others, however, the case is not so clear and in such instances Llewellyn's arguments have particular force. If the bar is going to prevent an automobile club from taking care of such matters as traffic violations and minor damage claims, then it should organize so as to provide as a substitute an acceptable service at an equally acceptable price. In the Chicago Motor Club case, the court found that in the property damage cases the average amount per claim was $12.39 and that fines assessed against members in Chicago for traffic violations averaged $2.45 each. It would be interesting to known what is happening to these cases now and what has actually been substituted for the legal services performed by the club.

The case for the collection agencies is stated in moderate terms by Mr. E. H. Lothian, Director of the Adjustment Bureau of the National Association of Credit Men. The history of the bar's activity on this subject is presented by Mr. Otterbourg. He shows conclusively that the courts have held that collection agencies have been engaged in the unauthorized practice of law and that the decisions have very closely restricted their future activities. Mr. Otterbourg also refutes the accusation of selfishness leveled against the bar. In this connection he says: "The desire of lawyers to uphold the ethics of their profession is based not upon self-aggrandizement, but rests upon the conviction that the continued usefulness of the profession as an instrument of public service must depend upon the maintenance and upholding of a correct professional attitude toward the public, toward their clients, and toward the courts. Lawyers generally regard this as self-evident. But the business men do not grasp this situation. The question, from their point of view, is a very simple one: if all the lawyers were honest and lived up to the standards of the profession, there would be no abuses—the legal profession 'should clean house.' If they want to give a claim to a collection agency, they do so because they do not think they need a lawyer at all. So why interfere with collection agencies? And, anyway, what right has the bar to insist upon the direct relationship of lawyer and client, if the client prefers it otherwise?" Actually, the collection agency battle is about over. Too long the reputable agencies have failed to police their own ranks. It is now clearly indicated that much of the work of the agencies will be returned to the bar where it belongs. A Declaration of Principles, adopted last year by the American Bar Association Committee and the New York State Bar Association Special Committee and concurred in by The Commercial Law League and representatives of the more important agencies, indicates a willingness on the part of the latter to abide by these principles which keep the control of law suits in the hands of lawyers. Decisions in the courts have forced the agencies to an almost unconditional surrender.

Here is a line of activity in which the bar has served in the past and can serve efficiently in the future. The test will be clear-cut. The commercial world will not accept a lower standard of service because of anything which is as theoretical to them as the relationship between lawyer and client. It seems safe to predict that here the bar will prove its adaptability and that the role of the collection agency in handling claims which must be litigated will be very restricted in the future.

It is in the real estate field where the clash now appears to be head-on. Mr. Nelson, Executive Vice-President of the National Association of Real Estate Boards, who writes for the realtors, indicates some irritation at the position of the bar. He accepts the test of what is in the best interests of the public, but applies it solely from the standpoint of getting the transaction through quickly and cheaply. Mr. Houck, Chairman of the American Bar Association Committee, stands on safe ground when he points out that there is danger in having a third party draft a document as agent covering a transaction in which he himself has an interest. In this regard Mr. Houck quotes the latest report of his Committee which says: "The legal profession recognizes that no persons having a conflicting interest should profit by drafting instruments or making investigations for others. One of the basic canons of ethics in the legal profession prevents an attorney from representing another in cases corresponding to the situation that arises when a real estate dealer negotiates a deal between two parties and acts for both."

The arguments of Mr. Nelson as to the licensing of real estate brokers are rather beside the point since there is as yet no effective policing, which is necessary to insure the maintenance of any standard of ethics. On the other hand, it is to be noted from Mr. Houck's article that the Unauthorized Practice Committee is not condemning every transaction by a real estate broker which may technically involve practice of the law. Results of the conflict in the real estate field seem likely to depend upon the reasonableness of both parties. The realtors must be willing to concede that the public may have some interest besides getting the deal through quickly and with a minimum of *present* expense. On the other hand the bar must be ready to adopt a common sense viewpoint by not insisting upon its right to pass on every paper connected with every real estate transaction, with a resulting inconvenience to the public which might more than outweigh possible benefits.

Appearances by laymen in a representative capacity before administrative bodies is well treated historically by William H. Robinson, Jr. of the Denver bar. His ultimate solution of uniform standards for practitioners before such bodies, which would depend on the consolidation of the multitude of administrative tribunals, seems impractical. Here again we hark back to Llewellyn. The lawyers need but to convince the judges of these tribunals of their greater efficiency on all counts in the particular branch of administrative law involved and their claims will be recognized.

Boyle Clark of Missouri writes with his usual force and effectiveness on what unauthorized practice of the law does to the ethics of the profession. The fundamental reason why the legal profession is entitled to a monopoly of the practice of law is cogently stated by him in the following paragraph: "With respect to the performance of professional services by laymen or corporations, it is immediately evident that the public and the administration of justice are injuriously affected. The unauthorized practitioner recognizes no obligation to the courts or to the public. His sole object is personal gain. Absent are the guarantees of superior skill, learning and character when he is employed. Likewise absent is the deterrent against dishonesty, disloyalty, and perversion of the laws present in the existence and enforcement of the code of professional ethics when the lawyer acts. Solicitation and salesmanship dictate the flow of employment rather than integrity and ability. The administration of justice is placed in the hands of the usurper, and the corporate entity responsible to its stockholders only. The

enforcible morals of the commercial practitioner of law are the enforcible criminal laws. So in this case the administration of justice and the public interest are subordinated to the pursuit of the dollar."

The last article in the collection is a carefully documented survey by Paul Sanders of present procedures for dealing with unauthorized practice. It brings up to date the procedural decisions and is invaluable to the committee or individual seeking a way to suppress unauthorized practice of whatever kind.

London Letter

Etiquette

THE Annual Statement of the General Council of the Bar for 1937 has just been issued and, as usual, it contains decisions on matters affecting the conduct and practice of the profession of Barrister-at-law.

A question was referred to the Council as to a barrister giving a proof of evidence to solicitors of what occurred at a hearing in which he was professionally engaged. The question arose out of a contemplated action for negligence by a lay client against his solicitors by whom the barrister had been consulted. The barrister replied to the solicitors that he was not prepared to give a statement or proof of evidence, but if his evidence was desired, he was prepared to attend in Court if so requested and give oral evidence and assist the Court as best he could by giving his recollection of any matters which the Court desired to be informed upon. The Council resolved that the attitude taken up by the Barrister was in accordance with the traditions and practice of the Bar. With regard to the further question as to whether he should furnish a proof of his evidence, the Council was of the opinion that it would not be in accordance with the traditions and practice of the Bar for him to do so. It was realised that occasions may arise in connection with contemplated litigation when it would be proper for counsel in the interests of justice to comply with a request for information as to what had occurred in the conduct of a case in which he has previously appeared, but counsel himself must decide whether the interests of justice so require.

A member of the English Bar, who was connected with a foreign country, was informed that an announcement in foreign newspapers of his commencement in practice as an English barrister at a professional address in England would be an unqualified advertisement and plainly contrary to the etiquette of the English Bar.

The opinion of the Council was asked as to whether it was unobjectionable to let rooms in a set of practising chambers to accountants, who would be independent, apart from their position as sub-tenants. The Council expressed the view that a practising barrister should not sub-let, or be party to sub-letting, rooms in his set of chambers to accountants.

A barrister has been, before his call to the bar, and had so continued, in a managerial post under a Statutory Public Utility Company. The question was asked whether he might represent the company in Court upon the instructions of the Company's solicitors. The Council answered that a barrister while in the employment should not accept briefs for his company.

Payment of Barristers Fees

The Disciplinary Committee of the Law Society, constituted under the Solicitors Act, 1932, recently found that a solicitor had been guilty of professional misconduct in receiving from clients certain sums for the specific purpose of paying counsel's fees, and having failed so to apply such sums or otherwise account for them; and in having made a false representation to a bank about certain property not being encumbered. The Disciplinary Committee ordered his name to be struck off the Roll of Solicitors.

The non-payment by solicitors of counsel's fees has become such a serious matter that in 1936 the General Council of the Bar was asked to make it a rule of the profession that in every case fees shall be paid upon delivery of the brief unless counsel is satisfied that there are good and sufficient reasons for a departure from this rule, but the Council's reply was "that the laying down of a rule for all cases is quite impracticable". Many members of the Bar do not see eye to eye with the Council in this matter. There are a number of barristers to whom sums of money are owing by solicitors, with very little chance of their being paid, as a barrister may not sue for his fee. True there is a remedy of sorts open to the aggrieved barrister. If he can prove that the solicitor has received counsel's fee from the lay client then he may report the matter to the Law Society who will bring pressure to bear upon the defaulting solicitor. But it can be easily understood why this remedy is not often applied. A member of the Bar can hardly approach the lay client for proof that the fee has been paid; but even if he did and the necessary action was taken by the Law Society, it would effectively close one channel through which work had come and might quite well affect work from other sources—a serious proposition for a young barrister. It is one of the advantages of fusion that such a state of affairs cannot occur thereunder.

In this connection it is interesting to refer to a lecture delivered by Samuel Warren, in the Hall of the Incorporated Law Society, in 1848, on the moral, social, and professional duties of attorneys and solicitors. He said: "Regard fees due to counsel as a *debt of honour*, the payment of which is a matter of peculiarly stringent obligation amongst gentlemen. Counsel have no means of compelling the performance of that duty, if once they have taken the brief, in reliance on your afterwards paying the fee, which, in point of strictness, ought always to be paid with the brief; and many eminent Attorneys and Solicitors still adhere rigidly to this rule." If this was possible and usual ninety years ago it is not easy to appreciate why it has now become "impracticable". Many lawyers believe, on the contrary, that it would have the effect of preventing abuses in both branches of the profession.

Remuneration of Barristers' Clerks

At a special general meeting of the Law Society, held on the 28th January, Mr. C. L. Nordon asked the Council to consider whether anything could be done towards abolishing the present system by which barristers' clerks are remunerated. The barrister's clerk, unlike clerks employed by the members of any other profession, is paid a proportion of the fee received by his Principal. Mr. Nordon suggested that this custom caused great difficulty. The barrister had nothing to do with the fixing of fees, and the gentleman who fixed the fee was interested in the amount. If the principal got no work, presumably the clerk got no reward. If the principal got a small fee, the clerk got a small reward; but if he could screw the solicitor up to a large

fee, then he did very well. A concrete example was given of a case in which, by the importation of a super leader, the fees of the leaders already engaged in the case were forced up to such an extent that, in a cause which had started in quite a modest way, Mr. Nordon's client had counsel's fees rendered amounting to £1,250. The motion had failed, and he had had to pay the costs of the other side amounting to some £2,000. The President replied that, whatever the demerits of the system, it was far too deeply rooted for the Council to eradicate it. This may be so, but the view is widely held by both branches of the profession that the system should be eradicated. Some barristers' clerks earn all that they receive, but many get a lot more than they are worth simply because their principals are competent. Barristers have been known to lose work as a result of the eagerness of the clerk to increase his own income in this way.

The matter has been discussed on numerous occasions. It is not certain when the present system was inaugurated but as far back as 1846 the subject of Gratuities to barrister's clerks was "renewed" in consequence of a larger amount than that specified in the scale approved by the judges having been peremptorily retained by a clerk as a matter of right. The solicitor in that case petitioned the Court and the then Master of the Rolls (Lord Langdale) decided that he had no jurisdiction over a barrister's clerk, but he expressed the opinion that "clerk's fees can only be considered as gratuities, which the solicitor or party consulting counsel may pay or not at his own option; that there is no legal demand; but clerk's fees are usually by custom paid, and are allowed on taxation to the amount mentioned in the scale approved by the Lord Chancellor and the other judges." As a result of this case the Council of the Incorporated Law Society deemed it advisable to send to all London solicitors the fixed scale of gratuities, and that scale has remained in force to the present day, with just one very slight variation. It may be of interest to record the present scale of fees; they are:

	£	s.	d.
Upon a fee under 5 guineas		2	6
5 guineas and under 10 guineas		5	0
10 guineas and under 20 guineas		10	0
20 guineas and under 30 guineas		50	0
30 guineas and under 50 guineas	1	0	0
50 guineas and upwards, per cent	2	10	0
On consultation, senior's clerk		5	0
On consultation, junior's clerk		2	6
On conferences		5	0
On general retainer		10	6
On common retainer		2	6

The reason for the difference in the fee received by the senior's clerk and that received by the junior's clerk in consultations is that consultations and conferences usually took place in the evening after the courts had risen and, in the old days, before gas and electricity had invaded the Temple, it was the custom for the senior's clerk to pay for the candles used. The five shillings reimbursed him for his outlay.

Official Referees

The London Gazette of the 20th January last announced that the King had been pleased, by warrant under His Majesty's Royal Sign Manual to declare that the Official Referees of the Supreme Court of Judicature shall each be called, known and addressed by the style and title of "His Honour" before his name and shall have place and precedence next after Knight's Bachelor. Official Referees were appointed under the provisions of the Supreme Court of Judicature Act, 1873. They are permanent officers attached to the Supreme Court for the trial of such questions as shall be referred to them by the court or a judge, and in such cases they have the full powers of a judge of the High Court, except as to attachment and committal. They deal with cases involving a prolonged investigation of accounts, and they assess damages. They also act as Arbitrators under a submission to arbitration in accordance with the provisions of the Arbitration Act of 1889, s.3. Each of the Official Referees has a separate court and chambers in the Royal Courts of Justice in London, and they sit either in London or in the country as they may from time to time be directed or deem most convenient. Appeal from an Official Referee lies only on a point of law and to the Court of Appeal. There are at present three Official Referees, who each receive a salary of £1,650 per annum, in addition to which the Treasury pays all proper and reasonable travelling expenses incurred by them in the discharge of their duties. The honour just conferred upon them places them, in that respect, on the same footing as a County Court Judge, who is always addressed as His Honour Judge so-and-so.

Lay Magistrates

In an address delivered by the Lord Chancellor at the annual meeting of the Magistrates Association on the 28th October, 1937, attention was drawn to the inconvenience which results from the retention upon the Commission of the Peace of the names of those justices who, from whatever cause, find themselves unable regularly to discharge the duties of a magistrate at quarter sessions or petty sessions. In view of the large correspondence which the Lord Chancellor later received on the matter he deemed it advisable to issue a circular to all Chairmen of Advisory Committees, Clerks of the Peace, and Clerks of Petty Sessional Divisions, in which he suggests that where a magistrate has removed from the county, or city or borough for which he was appointed, and has severed his connection with it, so that he can no longer discharge for that area any of the functions of a justice of the peace, it is his duty to resign from the Commission of the Peace. It was revealed that many magistrates, finding themselves in this position, considered that they were entitled to remain justices of their county or city or borough, either as a reward for services rendered or because they regarded the office as equivalent to the holding of some decoration or honour. The office is undoubtedly an ancient and an honourable one, and the gratuitous services of the lay magistrates are a valuable contribution to the administration of criminal justice; but a justiceship of the peace is not a title or honour, nor a reward for services. Neither should it be conferred for the mere purpose of enchancing the dignity of its possessor.

It is reported that more than 350 lay magistrates have resigned in accordance with the suggestions offered in the Lord Chancellor's circular.

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AMERICAN BAR ASSOCIATION JOVRNAL

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AMENDING THE CONSTITUTION

In fulfillment of the public assurance which they gave a year ago, the distinguished lawyers who constitute the Senate and House Committees on the Judiciary have proceeded with deliberate and thorough studies of the numerous proposals for changing the Constitution of the United States. Practically all of these proposals which have received substantial support had their origins in the great debate which took place, in and outside the Congress, on the Supreme Court issues. It has been fitting that they should receive the kind and extent of consideration which they have had at the hands of these representative Committees. It may be that at the next session of the Congress, some of these suggestions for amending the Constitution will reach the stage of decision whether they should be proposed to the States for ratification.

Numerous proposals to amend the Constitution so as to fix definitely the number of members of the Supreme Court, and to provide for the retirement of Federal judges, are before the Committees of the Congress. Eleven of the proposals would fix the number of Justices at nine; one would fix the number at eleven, with further increase if and as the number of Federal judicial circuits were increased; one resolution would fix the number of Justices at fifteen for the next twenty-five years, with a restriction that the number could not be changed more often than once in twenty-five years. As a practical matter, in view of the demonstrated opinion of the country, the principal question is likely to be whether the Congress should submit to the States an amendment which would put the number of members of the Court above casual increase or decrease in anyway except by the deliberate action of the States and the people.

Some ten proposals for amendment would write into the Constitution itself a definitive plan for the retirement of Justices of the Supreme Court. Retirement would be made compulsory and automatic at a fixed age, seventy or seventy-five years, with a provision for voluntary retirement at a lesser age. Retirement in all instances would be at full pay. As to the other Federal Courts, some of the proposals are for retirement at a lesser age than that specified for Justices of the Supreme Court; and a specified minimum period of service would be required for retirement at full pay.

In reporting upon and generally approving the objectives of these proposals, the Committee on Federal Legislation of the Association of the Bar of the City of New York declared that "none of the pending proposals appears to the Committee to be satisfactory for present approval," because of the failure to cover and provide for three essentials of a sound amendment on this subject, namely:

> "That to the extent that the plan is compulsory in form it should not be made applicable to the Justices in office on the date of its adoption.
>
> "That upon retirement of a Justice his office should automatically become vacant. Such an explicit provision in the amendment would obviate further confusion such as has occurred under the present retirement law, concerning the status of a retired Justice and whether a vacancy exists.
>
> "That the retirement of any Justice should become effective, not on the instant he attains the specified age, but at some convenient ensuing date—such as at the end of the term of the Court."

If the failure of the framers of the Constitution to fix the number of Justices and to provide for their retirement constitutes, as Mr. James Bryce pointed out, "a weak point, a joint in the Court's armor through which a weapon might some day penetrate," and if, as Chief Justice Hughes declared, an increase in the number of Justices above nine would impair the efficiency of the work of the Court, the formulation and recommendation of a proper amendment on this subject may well engage the best thought of the lawyers in the Committees on the Judiciary.

A proposed amendment which may also come to the stage of active consideration in the Congress is that of Senator Norris (S.J. Res. 134), to repeal Article V of the Constitution as it now stands, take away from the States all power to propose amendments, and provide for the ratification of constitutional amend-

ments by popular vote, the favorable action of no more than two-thirds of the States to be required for ratification, instead of the present three-fourths' vote. If submitted by the Congress to the States, this proposal provides for action upon it by State conventions, rather than by the State legislatures.

Subject to such minor textual changes as have been developed at the hearings before the Senate Committee, this proposed amendment is as follows:

"ARTICLE ——

"SECTION 1. Article V of the Constitution of the United States is hereby repealed.

"SEC. 2. The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part of this Constitution when ratified by popular vote in each of two-thirds of the several States as hereinafter provided.

"SEC. 3. Each amendment shall be submitted by each State to the electors thereof at the next general election held therein after the date the amendment is proposed; except that if a general election is to be held in any State within sixty days after the date an amendment is proposed the amendment shall be submitted to the electors in such State at the next succeeding general election. The electors in each State shall have the qualifications requisite for electors of the State legislature. Each State shall conduct the election and determine the result thereof as the law of such State provides, or, in the absence of such State law, as the Congress shall provide. The Congress shall have power to prescribe by a uniform law the form in which the question of the ratification of the amendment shall be submitted to the electors in the several States. If a majority of the electors voting in any State on any amendment vote for the amendment such State shall be deemed to have ratified the amendment.

"SEC. 4. No State, without its consent, shall be deprived of its equal suffrage in the Senate.

"SEC. 5. This article shall apply only with respect to amendments to the Constitution which are proposed after the ratification of this article."

Such a step toward subjecting *every part* of the Constitution to easy and quick amendment by popular vote seems unlikely to receive widespread support in the States, at a time when there is great public concern that America shall preserve inviolate the constitutional liberties and individual rights which are being trampled on by minority pressure-groups hastily marshalled into majorities in many other lands. Some parts of the Constitution, which deal solely with questions of legislative and fiscal policy, might conceivably, without serious damage to free institutions, be subjected to some process of easier, but still deliberate, amendment. On the other hand, the far more vital thing would be to put beyond the possibility of amendment by casual majorities such safeguards as the Bill of Rights and the provisions preserving the equal representation of the States in the Senate and the integrity of local and State governments.

Constitutional Amendments are ratified surely and quickly enough, when they are supported by a real consensus of public opinion. The last two Amendments were ratified within one year. The average time for all twenty-one Amendments to date is one and one-third years. The innovation proposed might slow up the process, not expedite it, as general elections in many States are biennial. The actual objective must be different results, not greater celerity. The State Legislatures, made up of men who are close to the concerns of local and State government, have usually disregarded party lines to withstand pressure for measures that were urged by insistent minorities seeking the centralization of powers in the National government. The obvious purpose or effect of substituting for this representative system a device of direct votes by the people at general elections devoted to partisan issues must be to clear the way for drastic changes which are deemed to be blocked by the present deliberative procedure.

All of these proposals of constitutional change deserve the enlightened and active consideration of members of the Bar throughout the United States. These would be changes in the fabric and structure of our constitutional system, and are not in themselves changes in the powers and functions of government on social or economic questions. Members of the American Bar Association have actively advocated the *amendment* method of constitutional change rather than altering the organic laws through re-constituting the Courts or through disregard of constitutional limitations. The orderly course is to let the States decide as to what changes, if any, they wish to make in the structure, powers and procedures of the National Government. The Committees on the Judiciary are on sound and patriotic ground when they weigh and view these proposals as matters for the action of the States according to the existing constitutional procedure. Those who have championed the orderly and established procedure for constitutional change should hold no resentment against resort to it. Every member of the Association should consider these pending proposals on their merits, and should promptly make known his views about them, to the Senators and Members of Congress from his State.

LETTERS FROM MEMBERS

It is characteristic of lawyers that, in sending in their mail ballots for the election of State Delegates, more than a few members of the Association also wrote letters to the Board of Elections, to make comments and offer suggestions concerning the poll. In all but a few States where vacancies were filled last year, the present election was the first in which all members of the Association in good standing have had the opportunity to vote by mail ballot for State Delegates; and unfamiliarity with the democratic procedure prompted some of the comments. In other instances, the voters offered suggestions whose adoption would, they believe, improve the system of nominations and elections. As some of these suggestions and comments may be typical of what came to the minds of many members who did not write, brief discussion of them may elicit a further and helpful consideration of them by the membership of the Association.

The suggestion most frequently made from this year's experience was that, along with ballots containing the names of the nominees, the Board of Elections should send a short biographical sketch, prepared without bias by the Board, to inform the voters as to the experience and qualifications of each nominee. Particularly in the larger States, where several thousand members of the Association receive ballots, the relative qualifications of opposing candidates are not readily known to all members of the Association; and lawyers do not show eagerness in voting for candidates they do not know and of whom they have no information. In some of the smaller States, where there are a few hundred members or less and the lawyers of the State are more generally known to each other, the need for supplying biographical data as to nominees may not be so manifest. Under ordinary circumstances, the need for sending out such informative sketches would not exist, if the nominees were lawyers well known to the rank and file of Association members in the State.

Beyond a doubt, this idea of implementing the mail-ballot electoral system with information designed to facilitate a discriminating exercise of the suffrage will receive a great deal of consideration. If the opinion of the Association seems generally to favor it, its adoption would appear to be within the powers of the Board of Elections. The principal deterrent might be the cost of preparing, printing, and sending out such data which would require a different leaflet for each of the fifty-one constituencies. The impartiality at all times of such biographical sketches, if prepared by the Board of Elections, may safely be assumed.

Another suggestion is to the effect that in each State a nominating committee selected by some one should canvass the situation and select some one who they believe would be a suitable candidate. Additional and opposing nominations could be made by petition. The idea of such an "official" designation by a committee was considered during the formulation of the present plan, and its adoption was then deemed undesirable. Whoever appointed the committee to make the "official" nomination in a State would be able in most instances to select the nominee who would be elected. It seemed preferable to eschew the possibility of clique control and to place all nominees on equal footing, by requiring all candidates to be nominated by petition and by requiring that the names of all sponsors who sign a nominating petition shall be published in the JOURNAL. Sooner or later, each State is likely to develop its own procedure for a careful selection of one or more nominees for State Delegate. The State Bar Association or any local Bar Association may bring forward a candidate; but all nominating petitions are to be signed by individuals, whose identity will be made known by prompt publication.

In only five of the larger States did opposing nominations appear on the official ballots as printed and sent out. That contests did not develop in a greater number of States may be attributable to the fact that in only one-third of the constituencies is the 1938 election for a full term of three years. In the others, the selection this year is for one or two years. Some members of the Association were disappointed to find only one name on the ballot in their State, and were inclined to ascribe the absence of contest to some omission of advance information and notice. Readers of the JOURNAL during the period for nominations will recall how numerous and extensive have been published notifications as to the procedure for nominating by petition and electing by mail ballot. Beyond doubt, however, the rank and file of members in a State find little incentive to mark and send in a ballot on which only one name appears. The *opportunity* for members to vote may be the significant thing, but the absence of contest leads to a relatively small vote.

If in any State there was only one nominee where more than a few members of the Association wished an opportunity to choose between qualified candidates, the responsibility is that of the members in that State. The incitement of rival candidates for State Delegate is not a function of the Board of Elections or of any other agency of the Association. The mem-

bers of the Association in each State will have to work out their own wishes in this respect; if they wish the names of two or more representative and outstanding lawyers to appear on their ballot, they will have to sign and file nominating petitions in behalf of candidates of that caliber.

By some members the suggestion has been currently made that at least two nominations should be required to be made in every State, so that the voters will have a choice in every instance. The soundness and wisdom of inserting such a mandate in the Constitution of the Association will be challenged by many members. If the lawyers of a State wish to bestow upon a nominee an unopposed election and only one petition is filed, why should some individual or group be commanded to enter an opposing candidate, to create a synthetic contest and choice where none was desired?

In 1939, one-third of the States will nominate their State Delegates by petition and elect them by mail ballot, for a three-year term. These constituencies are Maine, Connecticut, New Jersey, District of Columbia, South Carolina, Mississippi, Texas, Michigan, Illinois, Iowa, Nebraska, South Dakota, Arizona, Montana, Washington and Wyoming. It is the opinion of many persons familiar with the situation that in 1939 and thereafter there will be no dearth of opposing nominees in many of the States, without introducing a constitutional mandate that no one, no matter how well qualified and outstanding, be elected without opposition.

Members of the Association generally will understand that once they have signed a nominating petition and it is filed, and once they have sent in their ballots, such participation in the electoral process cannot be revoked or recalled by individuals. If a nominating petition sufficiently signed by members in good standing has been filed with and accepted by the Board of Elections, individuals who have signed it cannot invalidate it by asking to have their names stricken out. Once a member has marked and mailed his ballot, he cannot ask to have it returned to him with a new ballot which he may mark differently.

Although ballots will be received by the Board of Elections up to April 22nd, the indications are that the members of the Association are adapting themselves readily to this new and unfamiliar method of choosing State Delegates. They are becoming aware that, under the new system, no one dictates or arranges the matter for them, and that theirs is the responsibility for seeing to it that the necessary things are done to secure representative nominations, with opposing nominations if desired, and to accomplish the election of the better qualified candidate. It has taken a little while for the members, at home in the States, to "get the hang of" this decentralized and democratic procedure, but the indications are that this year's experience will assure an improved functioning in 1939 and thereafter.

SPECIAL SUBSCRIPTION RATE TO LAW STUDENTS

The American Bar Association, beginning with this issue, is offering the JOURNAL to law school students at a special subscription price of $1.50 per year. The object of this plan, which is, of course, experimental, is to encourage a wider reading of the JOURNAL by the young lawyers of tomorrow, in the hope that through its pages they may learn much which they cannot learn from other sources. They should, for example, acquire through the JOURNAL a more vivid appreciation of the problems and developments in the fields of administrative law, legislation and procedure. They should also, which is of still more importance, become more fully aware of the nature of the profession they aspire to enter—its accomplishments, its shortcomings, its aspirations and ideals and its many-sided activities. Finally, the JOURNAL will bring to students a closer understanding of the progress and objectives of bar organization, and of the many tasks which lie before it.

THE CINCINNATI CONFERENCE

We present in this issue several of the addresses delivered at the recent Cincinnati Conference on Administrative Tribunals, arranged and organized by the Cincinnati Bar Association under the auspices of the Ohio State Bar Association. It is a matter of genuine regret that lack of space renders it impossible for us to print all of these addresses, for they were uniformly of a high order and well worthy of publication. However, the complete report of the Conference will appear in the April issue of the Cincinnati Law Review, and those desiring to read the entire symposium will be able to find it there.

The JOURNAL takes this opportunity of acknowledging its obligation to the Cincinnati Law Review for furnishing us the material which appears in this issue, and to Dean Ferson for his generous and efficient assistance.

London Letter

(*Continued from page 297*)

Middle Temple Bench Book

The Honourable Society of the Middle Temple has just published a second edition of its "Bench Book". This is a register of Benchers of the Middle Temple from the earliest records to the present time. It has been compiled by J. Bruce Williamson, a Master of the Bench, who has written an historical introduction containing valuable and interesting information concerning the government of the Inn from early times, which he has extracted from the original Records. Master Heber L. Hart, whose term of office as Treasurer came to an end in November last, has written a foreword to the book in which he applauds the "unwearying diligence" of the Editor in searching out and deciphering those entries in the Records of the Inn which appeared most worthy of being rescued from oblivion. All who have read Master Bruce Williamson's "The Temple, London" and his many other contributions to the history of this famous Inn of Court will agree that "fortunate indeed is the Inn in having him for the chronicler of its lore".

In his introduction to the book the Editor observes that the compilers of the first edition seem to have overlooked the fact that the modern method of reckoning time according to the Gregorian Calendar was not adopted in England till the year 1752, prior to which date the year ended on March 24th and not on December 31st. The result was that wrong dates were inserted in that edition for all the Lent Readings down to 1752. These have been corrected. The introduction further deals with the early history and government of the Inn by Readers; the office of Treasurer; Associate Benchers; Calls to the Bar; the Interregnum and cessation of Reading; the Restoration and revival of Reading; payments on coming up to the Bench of the Inn; chambers in the Middle Temple; precedence in Parliament and Hall; honorary Benchers; and Readers' Arms. It should be here noted that the word 'Parliament' is used to describe the business meetings of the Masters of the Bench, who constitute the governing body of the Inn. Similarly in the Inner Temple the same designation is used; but in Lincoln's Inn and Gray's Inn they are called Councils and Pensions respectively. The Register of Masters of the Bench, with biographical notes, is preceded by a list of Treasurers and Readers. The earliest to be mentioned is Thomas Yonge de Bristoll, who was a Bencher prior to 1463. He was the son of Thomas Yonge, mayor of Bristol in 12 Hen. iv. He became a Serjeant in 1463; King's Serjeant by patent 8 Nov. 3 Edw. iv; Justice of the Common Pleas in 1467, and of the King's Bench in 1475. He died in 1476.

Appendices to the book contain, among other items, lists of Masters of the Temple Church since the Reformation; Readers at the Temple Church from 1571; Under-Treasurers of the Middle Temple since 1524; Keepers of the Middle Temple Library since 1642; and Organists at the Temple Church since 1688. The book is embellished with a number of remarkably fine illustrations—most of them taken from paintings in the possession of the Inn—in which are included one of the interior of the Hall and one of the beautifully carved screen erected in 1574. There is also a facsimile of a letter written by Edmund Plowden to Sir John Thynne at Longleat regarding the building of the Hall, which has been reproduced by permission of the Marquis of Bath. This is believed to be the earliest document known to exist relating to the building of the Hall.

Names in this book which will be of particular interest to all Americans are those of their celebrated countrymen who have been made honorary Benchers of the Middle Temple. Their presence there is yet another indication of the close comradeship which has always existed between that Inn and the American Bar as a whole.

The Temple. S.

THE NATIONAL HOUSING ACT AMENDMENTS OF 1938

By J. W. Brabner-Smith

FOR the time being President Roosevelt and Congress are hoping to stimulate a construction boom without federal funds by relying on an existing agency — the Federal Housing Administration, — through extensive amendments to the National Housing Act which aim to encourage private capital to loan money at lower interest rates, on more favorable terms, and more extensively, in the field of home and rental housing construction.

The decisions of the Supreme Court invalidating Title I of the National Industrial Recovery Act on the ground of improper delegation of power have had their unfortunate effect upon the drafting of amendments to the National Housing Act. A considerable part of the changes are merely explanatory of existing provisions, setting forth, as definite law, provisions of an administrative nature which formerly appeared in the regulations, and which more properly belong there so as to be readily modified. This is to avoid charges that the National Housing Act improperly delegates certain powers to the Administrator.

Modernization Loans

Administrator Stewart McDonald has had, under the National Housing Act, four distinct devices to encourage private capital, all of which have been considerably changed. The first, "Title I, Insurance," involved an agreement to insure financial institutions for all losses sustained up to 10% of the total of personal installment loans made to finance improvements to improved real property. This was discontinued on April 1, 1937, over one million property owners having obtained almost $600,000,000 of loans with losses running less than 1½% of all loans made. The 1938 amendments resurrect this form of insurance, eliminating loans for equipment and machinery, but increasing the maximum loan to $10,000, thus assisting the small business man. The amendments also authorize the in-

surance of this type of loan up to $2,500 for financing the building of new structures, including homes.

Insured Mortgage Loans

Title II, it will be recalled, provides for the insurance of long-term fully amortized mortgage loans, if the mortgagor has an equity of at least 20%. In the case of home loans, the mortgagor makes a fixed monthly payment, just as in the purchase of an automobile, which covers interest, amortization, insurance on the premises, taxes and mortgage insurance. A home mortgage not in excess of 90% of the appraised value of the property now may be insured if the loan does not exceed $5,400 and is on a newly constructed and owner-occupied home, and if 10% of the appraised value has actually been put up by the mortgagor in cash or land. Other home loans up to $16,000 continue to be insurable, but a 20% equity is still required, except for an adjustment in the case of homes from $6,000 to $10,000 in value.

Two important steps have been taken to reduce the cost of borrowed money. The annual mortgage insurance premium, formerly ½% of the original loan, is now ¼% on the decreasing principal balance in the new class of small home loans, and ½% of the decreasing balance in respect of other home loans. Moreover, the provision of the regulations allowing a service charge of ½% is eliminated. Thus the cost of mortgage money, if insured by the Federal Housing Administrator, will be reduced about 1%. This means that the monthly payment will be reduced about $1 per $1,000 of loan.

It will be recalled that the proceeds of insurance were paid in "debentures" which were guaranteed by the United States only in the case of mortgages insured prior to July 1, 1939. This limit is now removed, and the debentures are exempted from state and federal taxation, except surtaxes, inheritance, estate and gift taxes. However, they will bear 2¼% interest as compared with 3% interest formerly.

At the present time over one billion dollars of residential mortgages, representing the financing of more than ¼ million of homes, have been accepted for insurance by the Administrator, $170,000,000 in 1935, $438,000,000 in 1936, and $448,000,000 in 1937. During the last half of 1937, however, there has been a decrease over the same period last year, coincident with the general decrease in home construction.

Insurance of Large-Scale Housing Loans

Amendments to Section 207, which provides for mortgage insurance on large-scale housing projects, now known as "Rental Housing Insurance," should greatly facilitate the construction of these large rental housing dwellings. The maximum interest rate allowed is 4½%. The mortgagees, upon default, may now receive the proceeds of insurance merely by conveying the mortgage to the Administrator and paying a premium of 2% of the unpaid principal, instead of having to convey the mortgaged property to him. The implication of the original Act that insurance should be confined to "persons of low income," and the attendant problem of construing this phrase, is removed. There is now a definite maximum, insurable loans being limited to $1,350 per room. Under the old law, mortgages on 22 projects have been insured, located in Maryland, District of Columbia, Virginia, North Carolina, Indiana, Kentucky, Arkansas, Pennsylvania, New York, Texas, and Massachusetts, and the Administrator has agreed to insure mortgages on 16 other projects. The average rental per family unit in these projects is from $16.77 to 67.29. Most of the financing has been by large insurance companies.

A new provision, Section 210, has now been added, principally for the benefit of builders, which provides for insurance of mortgages, including funds advanced for construction, ranging from $16,000 to $200,000 in amount, on multi-family dwellings or developments of not less than 10 single family dwellings. However, the mortgage loan may not exceed $1,150 per room. "Walk-up apartment" construction, which is included in this class, in the past was financed through the sale of mortgage bonds to the public. The collapse of this method of financing is familiar to every lawyer. As a result, little money has been available for building apartments, except upon terms hard to meet.

National Mortgage Associations

To make certain that mortgage money, and cheaper money, will be available, Congress has facilitated the organization of national mortgage associations,—private mortgage banks patterned after the Credit Foncier and other European mortgage banks. The object of these financial institutions is to purchase insured mortgages, obtaining funds by selling their obligations to the public. None were formed prior to the recent amendments because private capital hesitated, doubtful of any considerable profit and questioning the availability of insured mortgages in any quantity. The amendments permit associations to initiate loans as well as to purchase them. Bonds and other obligations may be issued up to 20 times the capital and surplus and will be exempt from federal and state taxes, except surtaxes, estate, inheritance and gift taxes. The associations, including their franchise, capital, reserves, surplus, mortgage loans, income, and stock, are likewise tax exempt. Although the minimum capital is still $2,000,000, business may be commenced, except for the issuance of obligations, when 25% has been paid in. The Reconstruction Finance Corporation already has obtained a charter for an association of $10,000,000 of capital, so that mortgage money will soon be available through this channel, and it is anticipated that numerous private associations will be organized in a short space of time. If these associations can sell their bonds at 3 or 3½%, they can operate very profitably and still furnish cheap mortgage money.

It is too much to expect that these amendments to the National Housing Act will be an immediate stimulant to the construction industry. On the contrary, the reduction in the cost of home financing through the device of the insured mortgage loan may cause a temporary hesitation upon the part of certain mortgage financing institutions, which may be unwilling at first to cooperate at the lower rate, or may have to make certain readjustments, as in the case of those savings institutions which are paying interest based upon present mortgage interest rates. However, it is generally agreed that the home owner is paying too much for his money today, compared with rates on farm mortgages and other loans, and with comparative rates on home mortgages in other countries.

Approximately 285,000 dwellings were erected in this country last year, compared with 270,000 in 1936 and 55,000 in 1932, the low point. Private capital in England has been financing the construction of about 200,000 dwellings per year for a decade, although the

(*Continued on page 332*)

REVIEW OF RECENT SUPREME COURT DECISIONS

Power of Board, under National Labor Relations Act, to Direct Employer to Withdraw Recognition of Company Union under Circumstances Set Forth—Income Derived from Oil and Gas Leases from a State Held not Exempt from Federal Income Tax—Depletion Allowances under Revenue Acts of 1926 and 1928—Federal District Court's Injunction, Granted on Ground That No "Labor Dispute" Existed under Terms of Wisconsin Statute, and in Absence of Findings Prescribed by Norris La Guardia Act, Held Erroneous—Penalty Imposed on Bank for Usurious Interest May not Be Set Off against Claim Which Bank Has against Debtor's Trustee in Bankruptcy—Conciliation Commission, Acting under Section 75 of Bankruptcy Act, not Personally liable for Disbursements from Income Made in Good Faith—Liability for Additional Assessment under 1928 Revenue Act—New Mexico's Excise Tax on Gross Receipts from Advertising Held Valid—Other Cases

By Edgar Bronson Tolman*

National Labor Relations Act—Power of Board to Direct Employer to Withdraw Recognition of a Company Union

Under the National Labor Relations Act, the National Labor Relations Board is empowered, upon appropriate findings, to issue an order requiring an employer to cease and desist from unfair labor practices and to take such affirmative action as will effectuate the policies of the Act.

Under the Act, the Board may direct disestablishment of a company union and the posting of appropriate notices to the effect that recognition of such company is withdrawn, where the Board's findings, supported by evidence, show that the company union is incapable of functioning as a collective bargaining representative of the employees.

National Labor Relation Board v. Pennsylvania Greyhound Lines, Inc., 82 Adv. Op. 524; 58 Sup. Ct. Rep. 571.

In this case the Supreme Court sustained an order of the National Labor Relations Board ordering employers to disestablish a "company union" and to withdraw all recognition of such union and to post conspicuous notices informing their employees of such withdrawal. The Board made findings, supported by evidence, that the respondent and an affiliated company had engaged in specified unfair labor practices affecting interstate commerce, all in violation of § 8 of the National Labor Relations Act, by interfering with, restraining, and coercing employees in the exercise of their rights, guaranteed by § 7, in that they dominated and interfered with the formation and administration of a labor organization of their employees, Employees Association of the Pennsylvania Greyhound Lines, Inc., and had given it financial and other support. Thereupon the Board directed the respondents to cease the unfair practices, and to withdraw recognition as the employee representative and to post conspicuous notices of the Association that the "Association is so disestablished and that respondents will refrain from any such recognition thereof."

Upon the Board's petition to the Circuit Court of Appeals for enforcement of the order, that Court modified the order by eliminating from it all provisions requiring withdrawal by the respondents of recognition of the Employees Association and publication of the notice of withdrawal. In this, the Circuit Court was of the opinion that the Board was without authority to order the respondents to withhold recognition from the Association, without notice to it and opportunity for a hearing, and without an election by the employees to choose a labor organization to represent them.

On certiorari, this ruling was reversed by the Supreme Court.

In the Court's opinion, delivered by Mr. Justice Stone, it was observed that the findings of fact of the Board were not challenged as being without support in the evidence, and further, that the principal questions for decision were of law, whether in the circumstances, the Board was authorized by §§ 7, 8 and 10 of the Act to make the challenged order. Section 7 provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Section 8 enacts that

"It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

"(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . ."

Under § 10(b) the Board is authorized to hear complaints of unfair labor practices and § 10(c) directs that when the Board finds that any person is engaged in unfair labor practices it "shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practices, and to take such affirmative action . . . as will effectuate the policies of the Act. . . ."

An examination was then made of the history of the Act and of the findings of the Board. From this examination the Court concluded that the order was within the scope of the Board's authority as conferred by the statute. In this connection Mr. Justice Stone observed that the purpose of the Act was to protect

*Assisted by James L. Homire and Leland L. Tolman.

interstate commerce by securing to employees the rights, among others, to organize, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for that and other purposes. It was also pointed out that, before the enactment of the National Labor Relations Act, the court had recognized that "a company union" dominated by the employer may be the means of obstructing self-organization of employees and of their choice of representatives for collective bargaining, and that under the Railway Labor Act of 1923, the Supreme Court had upheld an injunction disestablishing a company union. The National Labor Relations Act was described as an extension of the governmental policy which found earlier and more limited expression in the Railway Labor Act. In this connection MR. JUSTICE STONE said:

"The National Labor Relations Act continued and amplified the policy of the Railway Labor Act by its declaration in § 7, and by providing generally in § 8 that any interferences in the exercise of the rights guaranteed by § 7 and specifically the domination or interference with the formation or administration of any labor organization were unfair labor practices. To secure to employees the benefits of self-organization and collective bargaining through representatives of the employees' own choosing, the Board was authorized by § 10(c) to order the abandonment of unfair labor practices and to take affirmative action which would carry out the policy of the Act.

"In recommending the adoption of this latter provision the Senate Committee called attention to the decree which, in the *Railway Clerks* case, had compelled the employer to 'disestablish its company union as representatives of its employees'. . . The report of the House Committee on Labor on this feature of the Act, after pointing out that collective bargaining is 'a sham when the employer sits on both sides of the table by supporting a particular organization with which he deals', declared: 'The orders will of course be adapted to the need of the individual case; they may include such matters as refraining from collective bargaining with a minority group, recognition of the agency chosen by the majority for the purposes of collective bargaining, posting of appropriate bulletins, refraining from bargaining with an organization corrupted by unfair labor practices.'"

Attention was then turned to the question whether the findings of the Board were sufficient to support this order. In dealing with this phase of the case, the Court reviewed the findings to the effect that the Employees Association was dominated by the employers throughout its history and was financially supported by the employers which had interfered with their employees in the exercise of the rights conferred by § 7 to form a labor organization and to bargain collectively through representatives of their own choosing. The by-laws of the Association were also described, and particular emphasis was placed upon provisions and regulations which enabled the employers to prevent review of matters which are the subject of collective bargaining and on the fact that the Association functioned primarily for the settlement of individual grievances rather than as an agency of collective bargaining.

There was a finding also that the officers of the respondent companies were active in warning employees against joining a union affiliated with the American Federation of Labor and in threatening them with discharge if they should join and in keeping the union meetings under surveillance. On these findings, the Court, while recognizing that there are situations in which the Board would not be warranted in concluding there was any occasion for withdrawal of recognition of an existing union before an election of employees under the Act, found nevertheless, that here the order was justified. Stating the Court's conclusions as to this legal question, MR. JUSTICE STONE said:

"We may assume that there are situations in which the Board would not be warranted in concluding that there was any occasion for withdrawal of employer recognition of an existing union before an election by employees under § 9(c), even though it had ordered the employer to cease unfair labor practices. But here respondents, by unfair labor practices, have succeeded in establishing a company union so organized that it is incapable of functioning as a bargaining representative of employees. With no procedure for meetings of members or for instructing employee representatives, and with no power to bring grievances before the Joint Reviewing Committee without employer consent, the Association could not without amendment of its by-laws be used as a means of the collective bargaining contemplated by § 7; and amendment could not be had without the employer's approval.

"In view of all the circumstances the Board could have thought that continued recognition of the Association would serve as a means of thwarting the policy of collective bargaining by enabling the employer to induce adherence of employees to the Association in the mistaken belief that it was truly representative and afforded an agency for collective bargaining, and thus to prevent self-organization. The inferences to be drawn were for the Board and not the courts. . . . There was ample basis for its conclusion that withdrawal of recognition of the Association by respondents, accompanied by suitable publicity, was an appropriate way to give effect to the policy of the Act."

The case was argued by Mr. Ivan Bowen for the respondents, and by Mr. Charles Fahy for the petitioner.

Taxation—Federal Income Tax—Depletion Allowances—State Instrumentalities

Under the Revenue Acts of 1926 and 1928 where the owner of oil in place sells the same to a producer at prices based on a sliding scale, and the purchaser, as part of the consideration, agrees to bear the operating expenses, while the owner supplies certain facilities and equipment, the gross income for the purpose of computing a depletion allowance is the cash received. A theoretical gross income may not be constructed by recourse to the expenses of production operations.

Under the Acts, allowances for depletion of oil and gas properties are not granted to processors and others who purchase the products from the owner of the wells, where the processors and others claiming the allowances have no capital invested in the oil and gas properties.

Income derived from oil and gas leases from a state are not exempt from the federal income tax on the ground that such leases are instrumentalities of the state. Gillespie v. Oklahoma, 257 U.S. 501, and Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 overruled.

Helvering v. Mountain Producers Corporation, 82 Adv. Op. 607; 58 Sup. Ct. Rep. 623.

In this case two questions were considered, the more important one involving a re-examination of the application of the rule inferred from the Constitution that the Federal Government may not tax the instrumentalities of a state.

The respondent, Mountain Producers Corporation, owned all of the stock of Wyoming Associated Oil Corporation. For 1925, it filed a consolidated return. In 1919, the affiliate held placer mining claims, leases and other interests in the Salt Creek Oil Field in Wyoming. Under the federal Oil and Gas Leasing Act of 1920 it exchanged the placer claims for govern-

ment leases. Later certain exchanges were made with other companies. In 1923 the affiliate made a contract with Midwest Refining Company agreeing to sell to the latter all oil produced in the field, and the Midwest Refining agreed to purchase all oil until January, 1934, on a sliding scale of prices based upon the average resale prices of oil received. The affiliate gave Midwest Refining free use of certain facilities and equipment and also such gas and oil as were necessary for production purposes. Midwest Refining agreed, as part of the price, to drill, case and maintain all wells, to supply water and to install and operate pumps and to conduct all of the development and production operations. Midwest Refining agreed to take delivery of the purchased oil at the outlet gates of the oil measuring tanks at or near the oil lands.

The first question was as to the amount of gross income of the affiliate for determining the proper depletion allowance. The respondent urged that the gross income of the affiliated company, for purposes of the statutory allowance for depletion, consisted of total cash payments received by the affiliate plus the cost of production which was defrayed by Midwest Refining under the contract. This contention was overruled by the Board of Tax Appeals but on appeal the contention was upheld by the Circuit Court of Appeals. The Supreme Court granted certiorari and reversed the judgment of the Circuit Court of Appeals. The following portion of the Court's opinion, delivered by MR. CHIEF JUSTICE HUGHES, indicates the reasoning upon which the reversal as to this question rests.

"The term 'gross income from the property' means gross income from the oil and gas . . . and the term should be taken in its natural sense. With the motives which lead the taxpayer to be satisfied with the proceeds he receives we are not concerned. If, in this instance, the development operations had failed to produce oil, it would hardly be said that the expense of drilling, borne under contract by another, constituted 'gross income' of the taxpayer within the meaning of the statute. Nor, when oil or gas is produced, does the statute base the percentage on market value. The gross income from time to time may be more or less than market value according to the bearing of particular contracts. We do not think that we are at liberty to construct a theoretical gross income by recourse to the expenses of production operations. The Refining Company for its own purposes undertook the expense of those operations, and Wyoming Associated was content to receive as its own return the cash payments for the oil produced, leaving to the Refining Company the risks of production.

"We are of the opinion that the cash payments made by the Refining Company constituted the gross income of Wyoming Associated and was the basis for the computation of the depletion allowance."

The second and more important question decided related to the constitutional question whether the taxpayer's claim for exemption was valid by reason of the fact that the income that the affiliated company received was derived by it under a trust agreement with the owner of an oil and gas lease from the State of Wyoming. In 1919, the State leased to Midwest Oil Company a section of school land for production of oil and gas, reserving a royalty to the State. Another lease was substituted later, and thereafter the lessee executed a declaration of trust of an undivided 50% in the lease and proceeds therefrom for the benefit of the Wyoming Associated Oil Corporation. The State reserved a royalty of 65% of the oil and gas produced. The question involved was whether Wyoming Associated was subject to federal income tax on the amount thus received. The claim advanced by the taxpayer was that it was entitled to immunity because Wyoming Associated is a state instrumentality. This contention was rejected by the Supreme Court.

While recognizing that *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, was distinguishable as a controlling authority upon the narrow grounds that the income there was derived by the lessee itself rather than under a declaration of trust by the lessee, the Court expressed its unwillingness to rest its decision on this narrow distinction and expressed the view that the *Coronado Case* should be re-examined in the light of other decisions as to the taxing power. Referring particularly to *Willcuts v. Bunn*, 282 U. S. 216, the Court cited numerous decisions in which it has declared that the power of taxation should not be crippled by extending the constitutional exemption from taxation to subjects which fall within the scope of constitutional authority when no burden is laid directly upon governmental instrumentalies. A review of that and other cases cited in the opinion led to the conclusion that the rulings in *Gillespie v. Oklahoma*, 257 U. S. 501, and *Burnet v. Coronado Oil & Gas Co., supra*, should be overruled. Referring to *Willcuts v. Bunn* and other decisions, cited in the opinion, MR. CHIEF JUSTICE HUGHES stated as follows, the Court's view that the claimed exemption here should not be allowed:

"These decisions in a variety of applications enforce what we deem to be the controlling view—that immunity from non-discriminatory taxation sought by a private person for his property or gains because he is engaged in operations under a government contract or lease cannot be supported by merely theoretical conceptions of interference with the functions of government. Regard must be had to substance and direct effects. And where it merely appears that one operating under a government contract or lease is subjected to a tax with respect to his profits on the same basis as others who are engaged in similar businesses, there is no sufficient ground for holding that the effect upon the Government is other than indirect and remote. We are convinced that the rulings in *Gillespie* v. *Oklahoma, supra*, and *Burnet* v. *Coronado Oil & Gas Company, supra*, are out of harmony with correct principle and accordingly they should be, and they now are, overruled.

"In the instant case, we find no ground for concluding that the tax upon the profits of Wyoming Associated derived under its lease from the State constituted any direct and substantial interference with the execution of the trust which the State has assumed, and the decision of the Circuit Court of Appeals to the contrary must be reversed."

MR. JUSTICE BUTLER delivered a dissenting opinion in which he cited prior decisions beginning with *McCulloch v. Maryland* (1819), 4 Wheat, 316, and ending with *Coronado Case, supra*, wherein have been recognized the constitutional rule that essential governmental functions of the state and federal governments may not be taxed by each other. In concluding his opinion, he expressed the view that the majority of the Court advanced no real reason for the sweeping change in constitutional construction effected by prevailing opinion, and said:

"To reach in this case the conclusion that respondent's affiliate is subject to federal income tax on the proceeds of its share of the oil received under the lease of state school lands, this Court expressly overrules *Gillespie* v. *Oklahoma, supra*, and *Burnet* v. *Coronado Oil & Gas Co., supra;* and with them necessarily goes a long line of decisions of this and other courts. The opinion brings forward no real reason for so sweeping a change of construction of the Constitution. It is to the plain disadvantage of Indian wards of the national government and school children of the sev-

eral States; it threatens many business arrangements that have been made for their benefit.

"I dissent."

MR. JUSTICE MCREYNOLDS concurred in the dissenting opinion.

The case was argued by Mr. Assistant Solicitor General Bell for the petitioner, and by Mr. Harold D. Roberts for the respondent.

In No. 446, *Helvering v. Elbe Oil Land Development Co.*, the question was as to the meaning of "gross income from property" under § 114(b)(3) of the Revenue Act of 1928 as used in relation to oil and gas wells. There certain payments to the respondent on the purchase price of the properties were made at stated times. The respondent contended that on so much of this as represented income it was entitled to a depletion allowance of 27½%. This claim was denied by the Supreme Court in a brief opinion by MR. CHIEF JUSTICE HUGHES upon the ground, principally, that the respondent had retained no capital investment in the properties and that "The words 'gross income from the property,' as used in the statute governing the allowance for depletion, mean gross income received from the operation of the oil and gas wells by one who has a capital investment therein,—not income from the sale of the oil and gas properties themselves." (82 Adv. Op. 615; 58 Sup. Ct. Rep. 621).

No. 406, *Helvering v. O'Donnell*, presented a similar question as to depletion allowances on gas and oil properties. There the respondent had sold stock in an oil company to Petroleum Midway Company, Ltd., in consideration of which the latter agreed to pay the respondent one-half of the net profits from the lands owned by the corporation in which the respondent had held the stock sold. As to the portion of net profits received the respondent claimed a depletion allowance. This claim also was disallowed by the Supreme Court in an opinion by MR. CHIEF JUSTICE HUGHES, on the ground that the respondent had no interest in the oil and gas in place on which to base such claim for a depletion allowance. (82 Adv. Op. 617; 58 Sup. Ct. Rep. 619).

In No. 387, *Helvering v. Bankline Oil Company*, the question of the propriety of an allowance for depletion as to gas produced from certain oil and gas wells was again involved. The respondent operated a casinghead gasoline plant and was engaged in the business of processing and extracting gasoline from wet gas. The respondent here received the gas for processing from the casingheads or traps at the mouth of wells owned by other parties, and under the agreements the owners were to pay the respondent 33⅓% of the total gross proceeds derived from the sale of gasoline thus extracted. Concluding that these contracts gave the respondent no capital investment in the gas in place, the Supreme Court, in an opinion by MR. CHIEF JUSTICE HUGHES, ruled that no depletion allowance should be made. (82 Adv. Op. 618; 58 Sup. Ct. Rep. 616).

In No. 388, *Bankline Oil Company v. Commissioner*, the question was raised as to whether a lease by the State of California held by the respondent was a government instrumentality entitling income therefrom to be exempt from the federal income tax. The respondent's claim to exemption was denied by the Supreme Court, in an opinion by MR. CHIEF JUSTICE HUGHES, on the authority of *Helvering v. Mountain Producers Corporation* reviewed herewith. The Chief Justice added that so far as *Burnet v. Coronado Oil & Gas Co., supra*, supports a different view, it is disapproved. (82 Adv. Op. 618; 58 Sup. Ct. Rep. 616).

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER concurred in the result in Cases Nos. 387 and 388, and MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part.

The cases were argued by Assistant Solicitor General Bell for the Government, and for the taxpayers by Mr. George T. Altman in No. 446, Mr. A. Calder Mackay in No. 406, and Mr. Martin J. Weil in Nos. 387 and 388.

Labor Law—Injunction to Restrain Labor Union from Coercing Employer to Force Employees Into Labor Organization

In a labor dispute the state law governs the substantive rights of the parties.

Under the Wisconsin Labor Code it is lawful to give publicity to the existence of a labor dispute and to facts involved therein by patrolling public streets without intimidation or coercion, or any other method not involving fraud, violence, breach of the peace or threat thereof, and inducing others, without fraud, violence or threat, to cease patronizing any person. Within the meaning of that Code a labor dispute is involved where a labor union patrols and pickets an employer to coerce his employees into joining the union, after he has advised his employees that they are free to join, and they have refused.

In such circumstances, a Federal District Court may not issue an injunction enjoining the activities of the labor union, in the absence of the findings of fact required by the Norris-La Guardia Act.

Lauf et al. v. Shinner & Co., Inc., 82 Adv. Op. 515; 58 Sup. Ct. Rep. 578.

In this opinion, by MR. JUSTICE ROBERTS, the Sureme Court reversed rulings of a Federal District Court in Wisconsin and of the Circuit Court of Appeals for the Seventh Circuit, enjoining the petitioners from seeking to coerce the respondent to discharge any of its employees because of their refusal to join a labor union, to compel its employees to become members of such organization, and from advertising that respondent is unfair to organized labor, and from molesting its patrons or customers or soliciting them not to patronize respondent's markets.

The District Court found that the respondent is a Delaware corporation maintaining five meat markets in Milwaukee, Wisconsin. The petitioners are an unincorporated labor union and its business manager, citizens and residents of Wisconsin. The respondent employs about 35 people, none of whom are members of the petitioning union. The petitioners demanded that respondent require its employees to become members of the union. The respondent notified its employees that they were free to join, but they refused to join. The employees had not chosen the union to represent them in dealings with the respondent. In order to coerce the respondent to require its employees to join the union, and to make it their bargaining agent, and to injure the respondent's business if it refused to do so, petitioners caused false and misleading signs to be placed before the respondent's markets, caused persons who were not employees of the respondent to parade and picket before the markets, falsely accused respondent to be unfair to organized labor, and by molestation, annoyance, threats, and intimidation prevented patrons and prospective patrons from patronizing respondent's markets. The Court also found that respondent suffered, and will suffer, irreparable injury from the con-

tinuance of the practice, and that more than $3,000 was involved in the controversy.

The District Court held that no labor dispute, in contemplation of state or federal law, existed in the circumstances and entered a final decree enjoining the petitioners from attempting to coerce the respondent to discharge its employees for refusal to join the union or to coerce the respondent's employees to join the union, and from advertising that respondent is unfair to organized labor, and from interfering with its patrons. The Circuit Court of Appeals affirmed the decree.

To resolve an alleged conflict of decision with *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, the Supreme Court granted certiorari. In decision of the case, MR. JUSTICE ROBERTS stated that the only errors pressed were the holdings that there was no labor dispute involved and that the Norris-LaGuardia Act and the Wisconsin Labor Code were not applicable to the case. While recognizing that a case was made for federal jurisdiction on the basis of diversity of citizenship, the Court pointed out that the power to grant injunctive relief in the circumstances is limited by certain federal statutes, and also that the substantive rights of the parties depended upon the laws of Wisconsin.

In dealing with the substantive rights of the parties, MR. JUSTICE ROBERTS expressed the view that it was error to hold that no labor dispute existed within the meaning of the state statute, and cited the statutory definition contained in Section 103.62, paragraph (3) of the Wisconsin Labor Code.

Error was found also in the District Court's failure to apply the provisions of Section 103.56 of the Wisconsin Labor Code which expressly makes it lawful in labor disputes to give publicity to the existence thereof or facts involved therein by patrolling public streets, without intimidation or coercion, or by any other method not involving fraud, violence, breach of the peace, or threat thereof, and inducing, without fraud, violence, or threat, others to cease to patronize any person; and peaceful picketing or patrolling, whether singly or in numbers. In this connection, the injunction was found too broad in that it condemned what the laws of Wisconsin permit as lawful conduct. With respect to this feature, MR. JUSTICE ROBERTS said:

"A Wisconsin court could not enjoin acts declared by the statute to be lawful; and the District Court has no greater power to do so. The error into which the court fell as to the existence of a labor dispute led it into the further error of issuing an order so sweeping as to enjoin acts made lawful by the State statute. The decree forbade all picketing, all advertising that the respondent was unfair to organized labor and all persuasion and solicitation of customers or prospective customers not to trade with respondent."

The Court ruled further that it was error to grant the injunction in the absence of findings prescribed as prerequisites thereto by the terms of the Norris-LaGuardia Act. That Act, § 13 (c), defines a labor dispute substantially as it is defined in the Wisconsin Labor Code. Section 7 forbids the granting of an injunction in a labor dispute except after a specified hearing and after findings of fact "'to the effect—(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained' and that no injunction 'shall be issued on account of any threat or unlawful act excepting against person or persons, association or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same . . .'"

Subsections (b) to (e) condition the granting of relief by injunction upon findings of substantial and irreparable injury to the complainant's property; that as to each of the items of relief granted, greater injury will be sustained by the complainant by denial of the relief than will be imposed upon the defendants by granting it; that there is no adequate remedy by law; and that the public police authorities are unable or unwilling to provide adequate protection to the complainant's property. Since the District Court made none of the required findings, except as to irreparable injury and lack of legal remedy, the Supreme Court concluded that the injunction exceeded the Court's jurisdiction.

MR. JUSTICE ROBERTS also declared that the Court of Appeals was in error in holding that the declarations of policy in the Norris-LaGuardia Act and the State Labor Code to the effect that employees are to have full freedom of association, self organization, designation of their chosen representatives free from interference by the employer places the case beyond the scope of both statutes, since the employer cannot, in this case, accede to the demands of the petitioning union without disregarding the declared policy of the statutes. Rejecting the view of the Court of Appeals on this point, MR. JUSTICE ROBERTS said:

"We find nothing in the declarations of policy which narrows the definition of a labor dispute as found in the statutes. The rights of the parties and the jurisdiction of the federal courts are to be determined according to the express provisions applicable to labor disputes as so defined."

In conclusion, the Court pointed out that since the case had been decided in the courts below upon the theory that there was no labor dispute involved, the legality of the petitioner's conduct and constitutionality of the law in legalizing any of their conduct had not been passed upon and, consequently, that the case would be remanded for further proceedings.

MR JUSTICE BUTLER delivered a dissenting opinion in which MR. JUSTICE MCREYNOLDS concurred.

The dissenting opinion stressed the fact that the petitioning union was not related in any way to the respondent and that the latter's employees were not members of the union so that in every legal sense the union was a stranger to both the respondent and its employees. It was emphasized also that the union had demanded that the respondent compel its employees, upon pain of dismissal, to join the union and make it their bargaining agent. Further commenting on the findings of fact, MR. JUSTICE BUTLER added:

"Every one who respects the lawful exercise of individual liberty of action must regard the attitude of the respondent as being above criticism and beyond reproach. The opinion of the Court just announced does not suggest a contrary view.

"Under these circumstances, the union, in order to force respondent to coerce its employees, and in pursuance of a conspiracy to that end, publicly and falsely accused respondent of being unfair to labor in dealing with its employees; and by means of false placards and banners and by picketing, molestation, annoyance, threats and intimidation it prevented, and when this suit was brought was continuing to prevent, patrons and prospective patrons from dealing with respondent—all to the latter's serious and irreparable injury."

In dealing with the legal questions, the dissenting opinion cited *Truax v. Corrigan*, 257 U. S. 312, as demonstrating the clear right of the respondent to the

injunction granted. Attention was then turned to the effect of the Norris-LaGuardia Act. With respect to that Act, the view was expressed that its declaration of policy must be considered in arriving at the meaning of the phrase "labor dispute" in the circumstances involved, and that the denial of the injunction permitted a defeat of the statutory purposes to enable employees to select representatives of their own choosing, free from coercion of the employer. In this connection, MR. JUSTICE BUTLER said, in part:

"The decision just announced ignores the declared policy of Congress that the worker should be free to decline association with his fellows, that he should have full freedom in that respect and in the designation of representatives, and especially that he should be free from interference, restraint, or coercion of employers. To say that a 'labor dispute' is created by the mere refusal of respondent to comply with the demand that it compel its employees to designate the union as their representative unmistakably subverts this policy and consequently puts a construction upon the words contrary to the manifest congressional intent.

"Moreover, the immediately preceding section of the Act, 29 U. S. C., § 101, provides that no restraining order or injunction in a case involving or growing out of a labor dispute shall issue 'contrary to the public policy declared in this chapter.' Sections 101 and 102 taken together constitute nothing less than an expression of the legislative will that the court shall enforce the public policy set forth in § 102 and shall have regard thereto in reaching a determination as to whether it has jurisdiction to issue an injunction in any particular case. Since the whole aim of the injury here inflicted and threatened to be inflicted by the union was to compel respondent to influence and coerce its employees in the designation of their representatives, the acts of the union were in plain defiance of the declared policy of Congress, and find no support in its substantive provisions."

Furthermore, the dissenting opinion urged that the facts of the case did not constitute a labor dispute, irrespective of the congressional declaration of policy. The correct meaning of the term "labor dispute" was then urged as follows:

"Undoubtedly 'dispute' is used in its primary sense as meaning a verbal controversy involving an expression of opposing views or claims. The Act itself, 29 U. S. C., § 113(c), so regards it: 'The term "labor dispute" includes any controversy concerning terms or conditions of employment,' etc. In this case, there was no interchange or consideration of conflicting views in respect of the settlement of a controversial problem. There was simply an overbearing demand by the union that respondent should do an unlawful thing and a natural refusal on its part to comply. If a demand by a labor union that an employer compel its employees to submit to the will of the union, and the employer's refusal, constitute a labor controversy, the highwayman's demand for the money of his victim and the latter's refusal to stand and deliver constitute a financial controversy.

"There being an utter lack of connection between the petitioners and respondent or its employees, the union was an intruder into the affairs of the employer and its employees. The union had the right to try to persuade the employees to join its organization; but persuasive methods failing, its right under the law in any manner to intermeddle came to an end. It lawfully could not coerce the employees to abandon their own organization and to join Local No. 73 any more than the employees could coerce the union to disband and its members to join their organization. Otherwise, the worker would not 'be free,' as the Act requires, 'to decline to associate with his fellows'; nor would he have 'full freedom of association, self-organization and designation of representatives of his own choosing.' Clearly the union could not be authorized by statute to resort to coercive measures *directly* against the employees to compel submission to its wishes, for that would be to give one group of workmen autocratic power of control in respect of the liberties of another group, in contravention of the Fifth Amendment as well as of the policy of Congress expressly declared in this Act. And that being true, the attempt to coerce submission through constrained interference of the employer was equally unlawful."

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in this case.

The case was argued by Mr. A. W. Richter for the petitioners, and by Mr. Walter L. Gold for the respondent.

National Banks—Penalty for Usurious Interest—Set Off in Bankruptcy

The money penalty imposed on a national banking association for receiving interest at an usurious rate may not be set off in bankruptcy against a debt owned by a bankrupt to the bank.

McCollum v. *Hamilton Nat. Bank of Chattanooga*, 82 Adv. Op. 565; 58 Sup. Ct. Rep. 568.

In this case question was involved as to whether an amount payable by a national banking association to a debtor as forfeiture for an usurious interest charge may be set off against a claim which the bank has against the debtor's trustee in bankruptcy. The petitioner was trustee in bankruptcy of the Lookout Planing Mills and sued in a county court in Tennessee to recover from the respondent, national banking association, the penalty imposed by §5198 for charging usurious interest. The respondent denied the liability and by cross-bill related that the bankrupt owed it $25,493.70 on notes and prayed that it be allowed to set off its claim against any judgment that the petitioner might recover by way of penalty. The bankruptcy trustee's answer was that the recovery of the penalty did not depend on the payment of the debt.

Section 5197 governs the rate of interest which is to be charged by national banking associations; §5198 declares that the receiving of a rate of interest greater than that allowed, when knowingly done, shall be deemed a forfeiture, and provides that in case of guilt the borrower may recover back twice the amount in interest paid by a suit similar to an action for debt. The county court found that the borrower had paid and the respondent national bank had knowingly received $5,235.55 as interest based on a rate in excess of that permitted, and awarded judgment for double that amount. But the county court also ruled that after judgment the bankruptcy trustee's claim was subject to set off and ordered that the amount awarded him be applied as a credit on the debt. The state Supreme Court upheld the set off as proper under the Bankruptcy Act, §68(a), and as authorized by §8769 of the Tennessee Code. On certiorari this judgment was reversed in an opinion by MR. JUSTICE BUTLER.

In arriving at this ruling, the Court emphasized that the liability for charging usurious interest is a penalty, and that to allow satisfaction of the penalty by a deduction from its claim against the bankrupt's estate which is enforcing the penalty would be to detract from the punishment prescribed by federal law. In this connection MR. JUSTICE BUTLER said:

"To allow respondent to satisfy the judgment for penalty by mere deduction from its claim against the bankrupt's estate is to detract from the punishment definitely prescribed. The sentence specifically required by the law may not be cut down by implication, set-off or construc-

tion; for that would narrow the statute and tend to defeat its purpose."

The Court stated further that the right of set off does not depend upon the Tennessee statute upon which the state court in part rested its ruling. Furthermore, no support was found for allowing the set off by virtue of §68(a) of the Bankruptcy Act which permits the set off of one debt against the other in the case of mutual debts or mutual credits between the estate of a bankrupt and a creditor, since the word "debts" and "credits" as there used are correlative. Here, it was pointed out, liability for the penalty does not arise in contact but is imposed as a disciplinary measure. It was noted further that the judgment determining the extent of the guilt and declaring sentence does not change the liability for the penalty into a liability for debt.

In conclusion, MR. JUSTICE BUTLER said:

"As the penalty may be enforced only in a suit brought exclusively for that purpose so that the trial of guilt or innocence may not be embarrassed by any other question, it is plain that the payment of any debt owed by the plaintiff to the bank may not be held a condition precedent to the determination of the issue. Punishment for usury does not depend upon payment of the borrower's debt. It follows that respondent is not entitled to satisfy petitioner's judgment by deducting the amount of it from respondent's claim against the bankrupt's estate.. . . Reason, well supported by authority, requires that the penalty for usury so specifically prescribed shall be paid according to the terms of the statute."

MR. JUSTICE CARDOZO took no part in the case.

The case was argued by Messrs. Joseph W. Thompson and Joseph B. Roberts for the petitioner, and by Mr. C. W. K. Meacham for the respondent.

Bankruptcy—Agricultural Compositions—Disbursements in Course of Administration

A conciliation commissioner, in the exercise of his powers in supervising the administration of the property of a farmer, in proceedings under Section 75 of the Bankruptcy Act, acts in a judicial capacity, and is not personally liable for disbursements of income from the property, made in good faith, in connection with such administration.

Expenses of administrating property in court in such proceedings are a paramount claim on the property.

Adair v. *Bank of America Nat'l Trust and Savings Assn.*, 82 Adv. Op. 590; 58 Sup. Ct. Rep. 594.

The opinion in this case is the first delivered by MR. JUSTICE REED since his appointment to the Supreme Court. It deals with proceedings under § 75 of the Bankruptcy Act as amended by the second Frazier-Lemke Act of August 28, 1935.

It appeared that on August 6, 1934, Cuccia, a farmer, filed a proper petition under § 75 of the Act showing secured claims due the respondent of over $12,000, and unsecured claims of a larger amount, and seeking a composition or extension of time for payment of his debts. The petition was referred to Adair, the Conciliation Commissioner, who is the petitioner on the writ of certiorai under review. On January 7, 1935, an amended petition was filed stating that the debtor had failed to obtain the approval of his creditors to a composition or extension and praying that he be adjudged bankrupt under Subsection (s) as enacted June 28, 1934. Adjudication of bankruptcy followed and the proceedings were referred to the referee in bankruptcy. On October 14, 1935, the District Court, on respondent's motion, dismissed the petition. The Debtor later attempted to obtain the benefits of § 75(s) as amended, but the subsequent proceedings were not dealt with in the opinion.

Throughout the proceedings the respondent bank held a matured note of the debtor and his wife secured by deed of trust on real estate and by mortgage on the crops thereof to be grown during 1933 and 1934, or prior to the payment of the debt. The crop mortgage required the debtor to cultivate, harvest and deliver the crop to the mortgagee, without cost to the latter, for sale and application of proceeds on the debt.

The controversy under review arose on the respondent's petition for an accounting by the Conciliation Commissioner of the funds realized from the sale of crops from the debtor's lands in 1934. An accounting was filed showing a deposit by the conciliator and the debtor of $1,437.37, and showing expenditures of all but $35.69 thereof for labor and materials in connection with the farming operations, living expenses allowed to the debtor, and certain legal fees in connection with the proceedings. The bank objected on the ground the disbursements were made without valid order of the District Court and without the bank's knowledge, and also that after the adjudication of bankruptcy under § 75(s), the Conciliator had no jurisdiction. The District Court found that the expenditures were made on order of the Conciliator in good faith for the purpose of conserving the estate. It allowed the account. The Circuit Court of Appeals directed disallowance of the account and payment by the Conciliator to respondent of the full amount of proceeds of the mortgaged crop. On certiorari this was reversed by the Supreme Court in an opinion by MR. JUSTICE REED.

The principal question in the case was whether the conciliator was personally liable for the disbursements. In holding that he was not, Mr. Justice Reed first reviewed the liberalization of the bankruptcy laws for the purposes of averting the evils of liquidation and for allowing composition and extension of debts in relief proceedings for various classes of debtors. In effecting these purposes § 75 contemplates, in agricultural compositions, the continuance of farm operations after the filing of a petition.

Attention was then directed to the nature of the function and office of the Conciliation Commissioner and emphasis was placed upon the judicial aspect of his position. In this connection it was observed that the qualifications for eligibility to the office are similar to those relating to the office of referee, and that all powers and duties of a referee in bankruptcy have been conferred upon the Commissioner. Citing these provisions, the Court concluded that there was no basis for holding the Conciliator liable, and said:

"In view of the foregoing the conciliation commissioner had the authority, prior to the adjudication of bankruptcy under Section 75(s), to act as the 'court,' in the first instance and subject to review, in controlling the property of the debtor 'in the best interests of the farmer and his creditors.' . . Under this authority the conciliation commissioner acted in authorizing the expenditures shown on the account for gathering the crop of 1934, preparing for the crop of 1935, and paying fees and expenses. It is plain that the conciliation commissioner, like the referee . . . exercises some of the 'judicial authority' of the bankruptcy court. The acts just detailed were judicial acts. Error within his jurisdiction does not subject him to personal liability. . . This doctrine is quite clear when, as here, no rule or positive enactment was violated and the acts were bona fide."

As to disbursements made after the adjudication in bankruptcy under subsection (s), the Court was of

the opinion that there was no personal liability upon the conciliator with respect to them, as he either acted judically by exercise of his powers as conciliation commissioner, or ministerially under the direction of the referee.

The Court added further that the principal items of expenditure were proper and consistent with the established rule that the cost of protecting a fund in Court is a paramount charge on such fund. Restating this rule and describing its application here, MR. JUSTICE REED said:

"Moreover, the expenditures assailed by respondent were proper, at least with respect to the principal items (which are the only ones we shall consider)—the amounts spent in harvesting the 1934 crop, which was sold in order to create the fund, and the amounts spent for preservation of the vineyard and for the cultivation of the 1935 crop. There is no showing that petitioner was improvident. Reference is made in his account to money paid to the farmer as 'living expenses,' but the record discloses that the amounts paid the debtor did not exceed the ordinary wages for the work he actually and necessarily performed in the maintenance of the vineyard. . .

"The court below ruled that under the crop mortgage the farmer had the obligation to cultivate and harvest the crop at his own expense, and therefore the gross proceeds belonged to respondent. This conclusion disregards the fact that the debtor did not harvest the grapes as an ordinary mortgagor. He had come into court seeking relief under Section 75 of the Bankruptcy Act. The filing of his petition put the property in the control of the court and the harvesting of the crop and the preservation of the property became a matter for the concern and action of the court.

"Respondent certainly cannot complain of the devotion of the proceeds of the 1934 crop to the cost of harvesting that crop. The care and harvesting of that crop represented the only way to preserve its worth . . . and the cost of protecting a fund in court is everywhere recognized as a dominant charge on that fund. . . The rule applies even in ordinary bankruptcy proceedings since the secured creditor benefits from the disbursement.

"And since the creditor in this case had a lien on the crop for future years and on the real estate, we cannot say that the money expended for maintenance of the real estate and toward production of the 1935 crop was not likewise for its benefit. . . Respondent itself has suggested, in another connection . . . that the grape vines require 'cultivation, pruning and care,' lest they 'deteriorate.' It is unnecessary to determine the effect of an expenditure of the proceeds of a crop where the mortgagee has no lien on the property preserved and protected by the expenditures."

MR. JUSTICE MCREYNOLDS concurred in the result.

The case was argued by Mr. William Lemke for the petitioner, and by Mr. Hugo A. Steinmeyer for the respondent.

Taxation—Federal Income Taxes—Liability for Additional Assessment

Under the Revenue Act of 1928, the acquittal of a taxpayer on an indictment of willful attempt to evade and defeat the tax is not a bar to a proceeding for recovery of the 50% assessment, provided for under §293, for a fraudulent deficiency. Neither the doctrine of res judicata nor double jeopardy is a bar to the latter proceeding.

Helvering v. Mitchell, 82 Adv. Op. 622; 58 Sup. Ct. Rep. 630.

In this case the Court passed upon a question as to the liability of a taxpayer for a 50% deficiency under § 293 of the Revenue Act of 1928, where the taxpayer has been acquitted of an indictment under § 146(b) of the same Act, for a willful attempt to evade and defeat the tax.

Under the latter section the respondent, Mitchell, was indicted and tried for fraudulently deducting in his income tax return for 1929 an alleged loss of $2,872,305.50 from a purported sale of National City Bank stock to his wife and for fraudulently failing to return $666,666.67 which he received as a distribution from the management fund of the company of which he was chairman and that these fraudulent acts were done with intent to evade the tax. On this indictment Mitchell was tried and acquitted.

He was also charged with a deficiency in his tax return of $728,709.84 on account of the fraud, and a 50% addition was added to the deficiency in the sum of $364,354.92 under the terms of § 293(b). The ruling of the Commissioner determining the amount of the deficiency was affirmed by the Board of Tax Appeals. On appeal to the Circuit Court of Appeals that Court sustained the deficiency of $728,709.84 but reversed the Board's ruling as to the 50% additional assessment on the ground that while Mitchell's acquittal was not a bar under the doctrine of *res judicata,* the imposition of the additional amount was barred by Mitchell's prior acquittal in the criminal proceeding.

On certiorari the judgment was reversed by the Supreme Court in an opinion by MR. JUSTICE BRANDEIS. The Supreme Court also was of the view that the acquittal was not a bar under the doctrine of *res judicata,* since the application of that doctrine is precluded by the difference in the degree of burden of proof in criminal and civil cases. As to the respondent's contention in this regard, MR. JUSTICE BRANDEIS said:

"The difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of *res judicata.* The aquittal was 'merely . . . an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.' . . It did not determine that Mitchell had not wilfully attempted to evade the tax. That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled. . . Where the objective of the subsequent action likewise is punishment, the acquittal is a bar, because to entertain the second proceeding for punishment would subject the defendant to double jeopardy; and double jeopardy is precluded by the Fifth Amendment whether the verdict was an acquittal or a conviction."

The respondent also contended that recovery of the 50% additional assessment was barred under the doctrine of double jeopardy, contending that the additional 50% is not a tax, but a criminal penalty intended as punishment for alleged fraudulent acts. In ruling on this contention, the Court considered the characteristics of the 50% additional assessment in contrast with the characteristics of a criminal sanction, remarking that sanctions to discourage tax evasions and to insure honest returns may be either civil or criminal.

Emphasis was first placed upon the fact that the Government relies primarily on the taxpayer's return for the relevant facts and that a remedial sanction, civil in character, appropriate to insure honest returns may be imposed in the form of a 50% additional tax. Describing differences between criminal and civil sanctions, MR. JUSTICE BRANDEIS said:

"Remedial sanctions may be of varying types. One which is characteristically free of the punitive criminal element is revocation of a privilege voluntarily granted. Forfeiture of goods or their value and the payment of fixed

or variable sums of money are other sanctions which have been recognized as enforcible by civil proceedings since the original revenue law of 1789. . . In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions."

The Court pointed out further that the remedial character of the sanctions imposing additions to a tax are provided primarily to safeguard the revenue and to reimburse the Government for the heavy expense of investigation and loss resulting from a taxpayer's fraud. The civil character of the 50% additional assessment was thought also to be shown by the fact that it may be collected by distraint as well as by proceeding in Court, since recovery of the additional assessment by distraint would make it unconstitutional, if the sanction were criminal in character. The distinctly civil procedure for collection of the 50% was cited further as an indication of congressional intent to create a civil rather than a criminal sanction. As to this MR. JUSTICE BRANDEIS said:

"That Congress provided a distinctly civil procedure for the collection of the additional 50 per centum indicates clearly that it intended a civil, not a criminal, sanction. Civil procedure is incompatible with the accepted rules and constitutional guaranties governing the trial of criminal prosecutions, and where civil procedure is prescribed for the enforcement of remedial sanctions, those rules and guaranties do not apply. Thus the determination of the facts upon which liability is based may be by an administrative agency instead of a jury, or if the prescribed proceeding is in the form of a civil suit, a verdict may be directed against the defendant; there is no burden upon the Government to prove its case beyond a reasonable doubt, and it may appeal from an adverse decision; furthermore, the defendant has no constitutional right to be confronted with the witnesses against him, or to refuse to testify; and finally, in the civil enforcement of a remedial sanction there can be no double jeopardy."

The separate classification of provisions imposing sanctions was likewise cited in support of the view that the 50% addition was intended to operate as a civil sanction.

MR. JUSTICE MCREYNOLDS was of the opinion that the judgment of the Circuit Court of Appeals should be affirmed.

MR. JUSTICE CARDOZO and MR. JUSTICE REED did not participate in the case.

The case was argued by Mr. Edward S. Greenbaum for the petitioner, and by Mr. William Wallace for the respondent.

Courts—Jurisdiction of State Court to Adjudicate Escheat to State of Moneys in Possession of United States

A state court may exercise its jurisdiction to adjudicate an escheat to the state of funds in the possession of the United States Treasury under R. S. §996, deposited there pursuant to order of a federal court, where the adjudication does not disturb the jurisdiction of the federal court as to any matter retained within its jurisdiction.

United States v. Klein, 82 Adv. Op. 582; 58 Sup. Ct. Rep. 536.

In this case the Court considered an appeal from the Supreme Court of Pennsylvania, which had reversed the overruling of a motion of the United States, in a Court of Common Pleas, to dismiss a suit brought there, whereby the appellee, on behalf of the State, sued to obtain a declaration that certain funds in the possession of the United States had escheated to Pennsylvania.

It appeared that certain secured bondholders had brought suit in a federal court in Pennsylvania to compel payment of bonds by the defendant therein, on the ground that the latter had appropriated the security to itself, and that a decree had been entered in favor of the plaintiffs and other bondholders similarly situated, with provision for notice to the bondholders to file claims in the suit. Some of the bondholders failed to file claims and the defendant was directed to pay into the registry of the court money due such bondholders, and finally the fund was deposited in the United States Treasury under R. S. § 996, respecting funds paid into court and remaining unclaimed for over five years.

Pennsylvania later laid claim to the moneys upon the ground that they had escheated to the State, since the persons entitled thereto had remained unknown for seven years. The trial court in Pennsylvania granted a motion of the United States to dismiss the petition on the ground that the state court was without jurisdiction to escheat moneys in the custody of the United States, or of its courts, but this ruling was reversed by the Pennsylvania Supreme Court. Thereafter the United States filed an answer, and on the trial of the issues the Court of Common Pleas gave a decree that the fund had escheated to the Commonwealth, that the appellee had authority to claim it and directed that he apply to the District Court for the moneys. The State Supreme Court affirmed so much of the decree as declared the escheat and authorized the appellee to prosecute the claim. On appeal the decree was affirmed by the Supreme Court in an opinion by MR. JUSTICE STONE.

In disposing of the case, the opinion points out that the Government does not set up any right to the money adverse to the unknown bondholders and does not contend that the fund can be or has been escheated to the United States, and also that there was no question that the fund remained subject to the order of the District Court to be paid to persons lawfully entitled to it upon proof of ownership. But the Government insisted that the decree declaring the escheat is an unconstitutional interference with a court of the United States and an invasion of its sovereignty, and an attempt, void under the Fourteenth Amendment, to exercise jurisdiction over absent bondholders and the money, neither of which were shown to be within the state. In rejecting these contentions, the Court noted that the possession of the property by a federal court gave it exclusive jurisdiction only so far as necessary for its appropriate control and disposition of the fund, and that other courts with jurisdiction to adjudicate property rights are not thereby necessarily deprived of jurisdiction to render a judgment not in conflict with the federal court's authority to decide questions within its jurisdiction and to make effective its decisions with respect to the property. It was then pointed out that in the present case the Federal District Court acquired jurisdiction to adjudicate the rights of the parties, and that that function had been performed so that jurisdiction was retained for the sole purpose of making disposition of the fund under its control, by ordering payment thereof to persons entitled thereto as required by § 996 of the Revised Statutes, and that the decree for the escheat of the fund did not disturb the Treasury's possession of the money or the District Court's authority over it. MR. JUSTICE STONE said:

"In this case jurisdiction was acquired by the district court, by reason of diversity of citizenship, to adjudicate

the rights of the parties. That function performed, it now retains jurisdiction for the sole purpose of making disposition of the fund under its control, by ordering payment of it to the persons entitled as directed by the federal statute. Beyond whatever is needful and appropriate to the accomplishment of that end, the jurisdiction and possession of the federal district court does not operate to curtail the power which the state may constitutionally exercise over persons and property within its territory.

"The present decree for escheat of the fund is not founded on possession and does not disturb or purport to affect the Treasury's possession of the fund or the district court's authority over it. Nor could it do so. . . . At most the decree of the state court purports to be an adjudication upon the title of the unknown claimants in the fund by a proceeding in the nature of an inquest of office as in the case of escheated lands. . . . and to confirm the authority of appellee to make claim to the moneys. It is subordinate to every right asserted and decreed in the federal suit and effective only so far as it establishes rights derived from them. Neither the nature of the suit in the district court nor the federal statutes preclude transfer of or change in the interest of the unknown claimants, either by judicial proceedings in the state court or otherwise, pending final disposition of the fund by the federal court. Section 996 of the Revised Statutes contemplates that changes in ownership of the fund may occur, since it provides that after the right to the fund has been finally adjudicated and it has been covered into the Treasury it shall be paid over to any person entitled, upon full proof of his right to receive it."

In conclusion, MR. JUSTICE STONE pointed out that the Government had not laid any claim to the fund apart from possession incidental to the decree of the District Court, and that all questions as to the effect of the decree of the state court of the fund's absence from the state or the absence or non-residents of unknown claimants would remain open for decision whenever an application was made to the District Court for payment of the fund.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in this case.

The case was argued by Mr. Assistant Attorney General Whitaker for the appellant, and by Mr. A. Jere Creskoff for the appellee.

Taxation—Excise Tax on Receipts from Advertising in a Journal of Interstate Circulation

The New Mexico privilege tax upon gross receipts is valid as applied to receipts of a publisher of a trade journal which has an interstate circulation, although the measure of the tax includes all receipts from advertisers residing outside the state, and does not validate the commerce clause of the Federal Constitution.

Western Live Stock v. Bingaman, 82 Adv. Op. 548; 58 Sup. Ct. Rep. 546.

In this case the Court considered the constitutional validity, under the commerce clause, of a tax upon gross receipts as applied to the appellants' business. As here applied, the tax involves a levy of 2% of the amounts received from the sale of advertising space in a trade journal. But the measure of the tax does not include receipts from subscriptions.

The appellants are engaged in the publication of a monthly livestock trade journal in New Mexico, where their only office is located. The journal circulates in that and other states. It carries advertisements, some of which are obtained in other states, in which cases payment is made by remittances to appellants sent interstate, and the contracts contemplate interstate shipments by advertisers to the appellants of material for publication. Payment is due after printing of the advertisements and their circulation.

The question for decision here is whether the tax as applied to the appellants' business imposes an undue burden on interstate commerce. The appellants contended that the sums earned under the advertising contracts are not subject to tax because the contracts constitute transactions across state lines and result in the transmission of advertising material between states, and also because performance involves distribution of the appellants' journal outside the state. In a suit to recover taxes paid under protest, the state courts sustained the tax and denied the recovery. On appeal this was affirmed by the Supreme Court in an opinion by MR. JUSTICE STONE.

The principal question considered in the opinion was whether the tax was invalid because performance of the contract for which compensation is paid involves, to some extent, interstate distribution of some copies of the journal containing the advertisements. In approaching this vexed question, Mr. Justice Stone called to mind that the purpose of the commerce clause was not to relieve those engaged in interstate commerce from a just share of state taxes even though many forms of state taxation add to the cost of carrying on the business, and cited several examples to illustrate this. Among these were the propriety of a property tax on instruments employed in interstate commerce, the taxation of net earnings from interstate commerce, and franchise taxes measured by net income from business within the state, including such portion of the income from interstate commerce as may be attributable to business done in the state, by a fair method of apportionment.

The validity of such taxes was contrasted with various unconstitutional taxes, held bad because their cumulative burdens were not imposed upon local business of different states. The underlying practical basis for the distinction between valid taxes which incidentally burden interstate commerce and those which are inadmissible were described as follows by MR. JUSTICE STONE:

"All of these taxes in one way or another add to the expense of carrying on interstate commerce, and in that sense burden it; but they are not for that reason prohibited. On the other hand, local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional. The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed . . . or added to . . . with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. . . The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove."

In the case at bar, the tax was viewed as an excise conditioned on the carrying on of the local business in selling advertising space in the journal, the measure of the tax being the price at which the advertising space is sold. This was thought to be analogous to a similar tax provision upheld on the privilege of manufacturing, measured by the total gross receipts from sales of manufactured goods both interstate and intrastate for the reason that the sale prices, being an appropriate measure of the value of the goods manufactured, are also an appropriate measure of the value of the privilege. In this connection, and relying upon

American Manufacturing Co. v. St. Louis, 250 U. S. 459, MR. JUSTICE STONE said:

"In the present case the tax is, in form and substance, an excise conditioned on the carrying on of a local business, that of providing and selling advertising space in a published journal, which is sold to and paid for by subscribers, some of whom receive it in interstate commerce. The price at which the advertising is sold is made the measure of the tax. This Court has sustained a similar tax said to be on the privilege of manufacturing, measured by the total gross receipts from sales of the manufactured goods both intrastate and interstate. *American Manufacturing Co. v. St. Louis, supra* 462. The actual sales prices which measured the tax were taken to be no more than the measure of the value of the goods manufactured, and so an appropriate measure of the value of the privilege, the taxation of which was deferred until the goods were sold. *Ficklen v. Shelby County Taxing District,* 145 U. S. 1, sustained a license tax measured by a percentage of the gross annual commissions received by brokers engaged in negotiating sales within for sellers without the state.

"Viewed only as authority, *American Manufacturing Co. v. St. Louis, supra,* would seem decisive of the present case. But we think the tax assailed here finds support in reason, and in the practical needs of a taxing system which, under constitutional limitations, must accommodate itself to the double demand that interstate business shall pay its way, and that at the same time it shall not be burdened with cumulative exactions which are not similarly laid on local business.

"As we have said, the carrying on of a local business may be made the condition of state taxation, if it is distinct from interstate commerce, and the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce. . . No one would doubt that the tax on privilege would be valid if it were measured by the amount of advertising space sold . . . or by its value. . . Selling price, taken as a measure of value whose accuracy appellants do not challenge, is for all practical purposes a convenient means of arriving at an equitable measure of the burden which may be imposed on an admittedly taxable subject matter. Unlike the measure of the tax sustained in *American Manufacturing Co. v. St. Louis, supra,* it does not embrace the purchase price (here the magazine subscription price) of the articles shipped in interstate commerce. So far as the advertising rates reflect a value attributable to the maintenance of a circulation of the magazine interstate, we think the burden on the interstate business is too remote and too attenuated to call for a rigidly logical application of the doctrine that gross receipts from interstate commerce may not be made the measure of a tax. Experience has taught that the opposing demands that the commerce shall bear its share of local taxation, and that it shall not, on the other hand, be subjected to multiple tax burdens merely because it is interstate commerce, are not capable of reconciliation by resort to the syllogism. Practical rather than logical distinctions must be sought. . . Recognizing that not every local law that affects commerce is a regulation of it in a constitutional sense, this Court has held that local taxes may be laid on property used in the commerce; that its value for taxation may include the augmentation attributable to the commerce in which it is employed; and, finally, that the equivalent of that value may be computed by a measure related to gross receipts when a tax of the latter is substituted for a tax of the former."

As an added reason why the tax is not subject to the constitutional objection urged, the Court emphasized that so far as value is contributed to the business by circulation interstate, it cannot be taxed elsewhere, since all the events upon which the tax is conditioned—the preparation, printing and publication of the advertising matter, and the receipt of the sums paid for it—occur in New Mexico and not elsewhere and are, consequently, beyond the control and taxing power of other states, irrespective of the commerce clause.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER were of the opinion the judgment should be reversed.

MR. JUSTICE CARDOZO took no part in the case.

The case was argued by Mr. D. A. MacPherson, Jr. for the appellants, and by Mr. Frank H. Patton for the appellees.

Railroads—Violation of Statute Prescribing Care of Cattle in Transit

A rail carrier, subject to the provisions of 45 U.S.C. §§71–75 prescribing resting, feeding, and watering of cattle at stated intervals, is subject to penalty for knowingly and willfully failing to comply with such statutory requirements. It is no defense to the carrier that the failure of compliance was due to an employee's negligent or willful failure to perform his duty with respect to the cattle, since such failure does not relieve the carrier of willful omission.

United States v. Illinois Central R. R. Co., 82 Adv. Op. 563; 58 Sup. Ct. Rep. 533.

In this case the Court sustained a judgment for a penalty against the respondent railroad company for violation of the Act of June 29, 1926, 45 U. S. C. § § 71, 74, which declares in 1, that no interstate carrier shall confine cattle in the same cars for longer than 28 consecutive hours, without unloading them into properly equipped pens for rest, water and feeding, unless prevented by storm or by other accidental and unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight. It permits an extension of time to 36 hours on written request of the owner. Section 2 requires that animals so unloaded shall be properly fed and watered. Section 3 provides: "Any railroad . . . who knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than $100 nor more than $500. . . ." The penalty is recoverable in the name of the United States by civil action.

In this case the Government alleged that the respondent knowingly and willfully confined cattle in a car for 37 hours without unloading them and the answer admitted such confinement but put in issue that the allegation the confinement was effected knowingly and willfully. It alleged that the car was consigned to New Orleans and arrived there at 11:35 P. M., October 9, 1932; that advance notice had been received as to the approximate time of arrival and of the time when the 36 hours would expire, and that the respondent's yardmaster negligently failed to notify the employee whose duty it was to unload the cattle and because of such oversight and negligence the cattle were confined in the car for 37 hours. The case was submitted on stipulated facts which were in substance those alleged in the answer. On these facts the trial court thought the failure to unload within the prescribed time was due to the negligence of the yardmaster and concluded that the respondent had not knowingly and willfully failed to comply with the statute. The Circuit Court of Appeals affirmed this decision. Thus the case depends upon the meaning of the phrase "knowingly and willfully" as used in section 3.

There was no doubt that the respondent knew when the permissible period of confinement would expire and by allowing that time to expire it "knowingly" failed in its statutory duty. Whether it had further done so willfully, was the principal question considered

in the opinion, it being observed that "willfully" means something in addition to "knowingly," since otherwise they would not be used conjunctively.

In construing the term "willfully," the Court was of the opinion that but for the negligence of the yardmaster it was clear that the respondent willfully violated its duty; and that so far as the yardmaster s conduct was concerned, it was immaterial whether his negligence was intentional or not. Summing up the case and defining the proper construction of the statute in relation thereto, MR. JUSTICE BUTLER said:

"Considered as unaffected by the yardmaster's negligence, respondent's failure to take the cattle from the car already placed at the yard for unloading, unquestionably discloses disregard of the statute and indifference to its requirements and compels the conclusion that, within the meaning of §3, respondent willfully violated its duty to unload as required by §1. It is immaterial whether the yardmaster's negligence or oversight was intentional or excusable. As between the government and respondent, the latter's breach is precisely the same in kind and degree as it would have been if its yardmaster's failure had been intentional instead of merely negligent. The duty violated did not arise out of the relation of employer and employee but was one that, in virtue of the statute, was owed by respondent to the shippers and the public. As respondent could act only through employees, it is responsible for their failure. To hold carriers not liable for penalties where the violation of §1 and §2 are due to mere indifference, inadvertence or negligence of employees would defeat the purpose of §3. Whether respondent knowingly and willfully failed is to be determined by the acts and omissions which characterize its violation of the statute and not upon any breach of duty owed to it by its employees. Respondent's contention that it is not liable because its failure was due to the negligence or oversight of the yardmaster cannot be sustained."

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in this case.

The case was argued by Mr. Gordon Dean for the petitioner, and by Mr. Selim B. Lemle for the respondent.

Summaries of All Other Opinions February 28 and Up to March 28

Taxation—Federal Income Tax on Persons Engaged in State Activities

Helvering v. Therrell, 82 Adv. Op. 537; 58; Sup. Ct. Rep. 539. (Decided Feb. 28, 1938.)

Writs of certiorari were granted to review rulings of Circuit Courts of Appeals in three circuits, as to whether the Federal Government is empowered to tax compensation paid attorneys and others out of corporate assets for necessary services rendered in connection with the liquidation of insolvent corporations by state officers proceeding under state statutes.

Nos. 128 and 129 involved liquidators of insolvent banks, acting under Florida statutes.

No. 287 involved legal counsel employed by the New York State Insurance Department, acting under the state statutes.

No. 597 involved an attorney employed in the Pennsylvania Department of Justice engaged in legal work relating to closed banks, acting under direction of and paid by the State Secretary of Banking.

In an opinion by MR. JUSTICE MCREYNOLDS, the power of the Federal Government to levy taxes on an employee's compensation was sustained in all four cases. The Court pointed out that the exemption of a state officer's compensation from federal taxation is inferred from the dual nature of the government set up by the Constitution, and that it is inferred to prevent conflict between national and state governments and to enable each to perform its governmental functions under the Constitution. It was emphasized here, however, that the compensation paid to the taxpayers in question was derived from corporate assets rather than funds belonging to the state, that no one of them was an officer of the state in the strict sense of the term, that the business in which they were engaged was not one utilized by the state in the discharge of its essential governmental functions, that the corporations being liquidated were private enterprises and that their funds were the property of private individuals.

The cases were argued for the petitioner by Mr. Solicitor General Reed, and for the respondents by Mr. Harry M. Voorhis in Nos. 128 and 129, Mr. Bernhard Knollenberg in No. 287, and Mr. John W. Townsend in No. 597.

Taxation—Federal Estate Taxes—Resolution of March 3, 1931, Not Retroactive

Hassett v. Welch et al., 82 Adv. Op. 575; 58 Sup. Ct. Rep. 559. (Nos. 75 and 484, decided Feb. 28.)

Certiorari to review two decisions of Circuit Courts of Appeals construing § 302(c) of the Revenue Act of 1926, as amended by the Joint Resolution of Congress dated March 3, 1931, and § 803 (a) of the Revenue Act of 1932.

The petitioners, one a former acting collector and the other a Commissioner of Internal Revenue, contended that § 302(c) of the Revenue Act of 1926, as amended, includes in the gross estate of a decedent, for computing the estate tax, property which was irrevocably transferred before the adoption of the amendments, with reservation of a life estate to the transferor; and that as thus applied the statute does not violate the due process clause of the Fifth Amendment. In an opinion by Mr. Justice Roberts, the Supreme Court ruled that the statute is prospective in its operation and does not impose a tax upon past irrevocable transfers with reservation of a life interest. In arriving at this conclusion the Court examined the judicial construction of earlier cases, legislative history, and administrative interpretation.

In view of the holding that there was no congressional intent of retroactive operation, the Court found it unnecessary to pass upon the contention that the statutes as applied to the transfers in question violate the due process clause of the Fifth Amendment.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part the cases.

In No. 349, *Helvering v. Bullard*, 82 Adv. Op. 572; 58 Sup. Ct. Rep. 565, the construction of § 302(c) of the Revenue Act of 1926, as amended, was again involved. There a conveyance in trust had been made in 1927. However, the trust was later attacked as in violation of the rule against perpetuities in Illinois, and a new agreement was executed in 1932 pursuant to a consent decree. The Court ruled that the settlement and transfer for purposes of determining tax liability were governed by the agreement and consent decree of 1932, and did not relate back to the earlier transfer of 1927 which was held void under the law of Illinois. Since the controlling transfer took place in 1932, after the Joint Resolution of 1931, the corpus of the trust was

found to be a part of the gross estate subject to the transfer tax.

In this case also, MR. JUSTICE ROBERTS delivered the opinion of the Court and MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the case.

The cases were argued for the petitioners by Mr. Assistant Attorney General Morris, and for the respondents by Messrs. John L. Hall and Claud R. Branch in No. 375, Mr. William D. Mitchell in No. 484, and Mr. Samuel S. Holmes in No. 349.

Federal Income Tax—Suits for Erroneous Refunds —Limitations

United States v. Wurts, 82 Adv. Op. 634; 58 Sup. Ct. Rep. 637 [No. 499, decided March 14, 1938.]

Certiorari involving the interpretation of § 610 of the Revenue Act of 1928 which requires the United States to bring suit to recover erroneous tax refunds "within two years after the making of such refund." The lower courts had held that the two year limitation began to run at the time when the refund was allowed, and not when it was actually paid.

The opinion by MR. JUSTICE BLACK holds that this is error; that the Congress did not intend the limitations of § 610 to run against the Government until the Government's right had accrued in a shape to be effectively enforced, and that by this test the statute only begins to run when the claim is actually paid and not when it is erroneously allowed.

MR. JUSTICE REED took no part in the case.

The case was argued on February 28, 1938, by Mr. Arnold Raum for the petitioner and by Mr. Claude C. Smith for the respondent.

War Risk Insurance—Incontestability

United States v. Patryas, 82 Adv. Op. 585; 58 Sup. Ct. Rep. 551. [No. 445, decided February 28, 1938.]

Certiorari involving the construction of § 307 of the World War Veterans Act of 1924, which provides that veterans war risk insurance policies are incontestable except for fraud, non-payment of premiums or on the ground that insured was not in the military or naval forces. In this case the policy was purchased in 1918 but allowed to lapse upon the veteran's discharge in 1919. In 1927, it was reinstated, and then converted into a term contract which did not expressly exclude disability prior to issuance as did the original contract. The Government contested payment of the policy on the ground that the veteran was permanently disabled before the policy was reinstated and converted.

The opinion by MR. JUSTICE BLACK denies the Government's contention. It finds that the Congress intended to authorize insurance covering past or future total permanent disability, and that the incontestability clause must be construed to prevent avoidance of liability on any but the grounds specifically stated in the statute. Since disability prior to insurance is not among these, it may not be relied upon to defeat payment.

MR. JUSTICE REED took no part in the case.

The case was argued on February 11, 1938, by Mr. Wilbur C. Pickett for the petitioner and by Mr. Warren E. Miller for the respondent.

Procedure—Time for Appeal—Applicability of Criminal Appeals Rules in Hawaii

Mookini et al v. United States, 82 Adv. Op. 532; 58 Sup. Ct. Rep. 543. [No. 319, decided February 28, 1938.]

Certiorari to determine the applicability in the district court for the Territory of Hawaii of the Criminal Appeals Rules promulgated by the Supreme Court on May 7, 1934. Here an appeal from the district court of Hawaii was allowed within the three month's period prescribed by § 8 (c) of the Act of February 13, 1925, but not within the time or in the manner prescribed by Rule III of the Criminal Appeals Rules. These rules were promulgated under authority of U. S. C., Title 28, § 723 (a), which authorized the Court to prescribe such rules for criminal proceedings in "district courts of the United States including the district courts of Alaska, Hawaii, Puerto Rico, Canal Zone," etc. In preparing drafts of these rules for the court, the Attorney General had suggested that because of lack of data and peculiar conditions, the rules should be established first for the continental United States district courts, and possibly later for the courts of the Territories. Accordingly, the Order promulgating the rules listed as governed by them only the "district courts of the United States and the Supreme Court of the District of Columbia" and did not name the Territorial courts.

The opinion by MR. CHIEF JUSTICE HUGHES holds that the rules are inapplicable in Hawaii, and that, therefore, the appeal is timely. It finds that Congress did not intend to require the Court to promulgate identical rules at one time for all the courts mentioned in the Act, but that it permitted the Court to exercise its discretion in this matter; that the words "district courts of the United States" as used in the Order of promulgation does not include courts of the Territories; that the provisions of the Organic Act of Hawaii (U. S. C., Title 48, § 645) that appeals from the district court of the Territory to the Circuit Court of Appeals be taken in the same manner as appeals from district courts was modified by the Act authorizing the Court to promulgate rules in that, by the latter act, the Court was given full authority to determine in what manner appeals shall be taken. Therefore, since the Supreme Court has not changed the practice in Hawaii, the statutory provision as to appeals from the district court is not superseded so far as this proceeding is concerned.

The case was argued on February 2, 1938, by Mr. Bates Booth for the respondent and submitted by Mr. O. P. Soares for the petitioners.

Interstate Commerce Act—Pooling Agreements— "Carrier Involved" Defined

Escanaba and Lake Superior Railroad Co. v. United States, 82 Adv. Op. 568; 58 Sup. Ct. Rep. 556. [No. 415, decided February 28, 1938.]

Appeal from statutory three judge district court involving the construction of § 5 (1) of the Interstate Commerce Act, as amended, which provides that agreements to pool shipping business of carriers subject to the act may be approved as in the public interest by the Interstate Commerce Commission "if assented to by all the carriers involved." Here two lines (Milwaukee and Northwestern) agreed to a pooling arrangement for their business of shipping ore to Escanaba, Michigan. Milwaukee had previously granted certain trackage rights to the Escanaba Railway, and had agreed to pay

certain wheelage charges to Escanaba. Escanaba contended that, since the pooling agreement of Milwaukee and Northwestern would affect its business under this agreement with Milwaukee, it is a "carrier involved" within the meaning of the statute, and that it consent to the agreement is therefore necessary.

The opinion by MR. JUSTICE ROBERTS finds that Escanaba is not a "carrier involved"; that Congress intended the statute to be liberally construed in the interest of the public; that since Escanaba was not actually a party to the agreement, its assent is not required, even though it will be affected by the agreement and that the context of the statute so indicates. The opinion points out that to hold otherwise would make it possible for any carrier affected by a pooling proposal to defeat the public interest by withholding its consent.

The case was argued on February 4 and 7, 1938, by Mr. John S. Burchmore for the appellant and by Mr. J. Stanley Payne and Mr. C. R. Sutherland for the appellees.

Jurisdiction of Supreme Court—Rate Making—Judicial Review—Federal Question

Southwestern Bell Telephone Co. v. Oklahoma et al., 82 Adv. Op. 597; 58 Sup. Ct. Rep. 528. [No. 560, decided February 28, 1938.]

Appeal from the Supreme Court of Oklahoma which denied a "petition for rehearing in the nature of judicial review" after a decision affirming an order of the State Corporation Commission fixing rates for telephone service. Appellee moved to dismiss the appeal for want of jurisdiction because the proceeding in the State Court was legislative in character, and was not a "suit" within the meaning of U. S. C., Title 28, § 344. It was conceded that the original hearing in the Oklahoma Supreme Court was legislative in character, but appellant argued that the legislative function was completed when the opinion was filed, and that the petition for rehearing was an invocation of the court's judicial power. On the other hand, the State argued that the rehearing did not change the character of the proceeding, but that it remained legislative and that other provisions of the State Constitution, permitting writs of mandamus and prohibition against the Commission, afforded adequate methods of judicial review.

The Court's *per curiam* opinion granted the motion to dismiss. It finds that the lack of state precedents, the novelty of the proceeding, and the brevity of the State Court's ruling denying the petition for rehearing make it impossible for the Supreme Court to know on what theory the State court acted. The opinion points out that it is essential to the Supreme Court's jurisdiction that the record affirmatively show that a Federal question was necessarily presented to the State court and that the question was actually decided or that judgment given could not have been rendered without deciding it. Applying this rule to the record, the opinion concludes that the appeal be dismissed.

The motion was argued on February 7, 1938 by Mac Q. Williamson for the appellees and by Mr. Erwin W. Clausen for the appellant.

Jurisdiction of District Courts—Removal—Jurisdictional Amount—Remand

Saint Paul Mercury Indemnity Company v. Red Cab Company, 82 Adv. Op. 541; 58 Sup. Ct. Rep. 586. [No. 274, decided February 28, 1938.]

Certiorari to review decision remanding to the state court an action in which, at the time of removal, the complaint disclosed that the amount in controversy exceeded that required for Federal jurisdiction but where, after removal, the complaint was amended to reduce the sum to substantially less than that amount. The action was begun in the Indiana courts on an Indiana Workmen's Compensation Indemnity contract claiming damages of $4,000 on account of failure of the Indemnity Company to recognize numerous compensation claims made against the insured by its injured employees. The Indemnity Company caused the case to be removed to the U. S. District Court in Indiana. The complaint was then amended twice, in each instance the amount claimed remained at $4,000, but plaintiff attached to his second amended complaint an exhibit giving particulars of the compensation claims involved and showing a total amount expended by him of only $1,380.98. After trial in the district court, he recovered $1,162.98. The Court of Appeals refused to decide the merits and ordered the case remanded to the Indiana court on the ground that the record did not show the $3,000 jurisdictional amount required by § § 24 and 28 of the Judicial Code.

The Court in an opinion by MR. JUSTICE ROBERTS reversed the Court of Appeals. The opinion examines at length the statutes and precedents in regard to the right to removal, and the situations in which remand is required. It concludes that since, on the face of the pleadings, the defendant was entitled to invoke the jurisdiction of the Federal court and was required by law to do so before answer or waive the privilege, and since there is no evidence of bad faith or collusion in seeking to bring the case to the Federal court, the Federal jurisdiction was properly invoked and was not divested by the subsequent amendment or by recovery of less than $3,000. The opinion notes that it would defeat the purpose of the removal statutes to hold that plaintiff, by subsequently reducing the amount claimed, can take away defendant's right to invoke Federal jurisdiction.

MR. JUSTICE REED took no part in the case.

The case was submitted on January 10, 1938, by Mr. Burke G. Slaymaker for the petitioner and by Mr. William E. Reiley for the respondent.

Unfair Labor Practices—Company Unions—Finality of Labor Board Findings

National Labor Relations Board v. Pacific Greyhound Lines, Inc., 82 Adv. Op. 530; 58 Sup. Ct. Rep. 577. [No. 504, decided February 28, 1938.]

Certiorari involving the validity of an order of the National Labor Relations Board under § 10 (c) of the National Labor Relations Act requiring respondent to withdraw recognition of a company union and to give notice of withdrawal to its employees.

The Court's opinion by MR. JUSTICE STONE finds that the order is valid. It reviews the record and the findings of the Board to the effect that the company union had three times been successfully used to prevent the organization of a union independent of company domination, and that the continued recognition of the company union by the employer would afford a device by which free choice by the employee would continue to be obstructed, and concludes that the Board's action was not without support in the evidence and in the Board's unchallenged subsidiary findings.

MR. JUSTICE REED took no part in the case.

The case was argued on February 4, 1938, by Mr. Charles Fahy for the petitioner and Mr. Ivan Bowen for the respondent.

Procedure—Appeal—Assignments of Error—"Progress of the Trial" Defined

The Century Indemnity Co. v. Nelson, 82 Adv. Op. 535; 58 Sup. Ct. Rep. 531. [No. 362, decided February 28, 1938.]

Certiorari to review circuit court holding that in a jury waived case assignments of error based upon the court's refusal of defendant's requested Special Findings presented to the court after an order "that judgment be entered for plaintiff upon findings of facts and conclusions of law to be presented" but before the time when the findings of fact and conclusions of law were signed by the district judge can not be considered on appeal to the circuit court because the requests were not made "during the course of the trial" as required by U. S. C., Title 28, § 875.

The Court's opinion by MR. JUSTICE MCREYNOLDS holds that the progress of the trial did not end until final judgment had been entered on the special requests subsequently presented in compliance with the preliminary order. The opinion finds that the district court rule 42, which prescribed the practice that was followed, the wording of the preliminary order, and the subsequent action of the court and counsel all indicate that all parties considered the action to be "in progress of trial" until that time. The opinion concludes that the assignments of error should have been considered by the appellate court.

The case was argued on February 2, 1938, by Mr. Jewel Alexander for the petitioner and submitted by Mr. Joe G. Sweet for the respondent.

National Banks—Insolvency—Trusts—Creditor's Lien for Interest

Ticonic National Bank et al. v. Sprague et al., 82 Adv. Op. 630; 58 Sup. Ct. Rep. 612. [No. 374, decided March 7, 1938.]

Certiorari involving the question whether a secured creditor of a national bank, holding a non-interest bearing claim, is entitled to interest for any period subsequent to the insolvency of the bank, when the assets on which he has a lien are sufficient to pay the principal and interest but the total assets of the bank are not sufficient to pay in full all creditor's claims as of the date of insolvency. Acting under authority of Section 11 (k) of the Federal Reserve Act, the Bank had accepted trust funds awaiting investment and deposited them in its commercial account, and at the same time had set aside in the trust department as security for the funds, bonds equal in value at least to the total amount of the deposits. After insolvency, the trustees brought this suit to impress and enforce a lien upon the proceeds of the bonds set aside to secure the deposits. The lower court allowed the claim and allowed also a claim for interest from the date of the filing of the complaint.

The Court's opinion by MR. JUSTICE REED holds that the right to interest as damages for failure to pay an unexpended balance in a deposit upon demand is an incident to the right to recover the balance; that the obligation to pay interest is not cut off by the bank's suspension of business and that a creditor whose claim has been erroneously disallowed is entitled to interest from the time a ratable amount was paid other creditors. The opinion further holds that this right may be enforced by secured creditors from the assets securing their original claim, until both principal and interest are satisfied, regardless of whether the claims of general creditors can be met in full.

The judgment of the district court was therefore affirmed.

The case was argued on February 2 and 3, 1938, by Mr. George P. Barse, for the petitioners and Mr. Harvey D. Eaton for the respondents.

Jurisdiction of District Courts—Order of Interstate Commerce Commission Defined—Railway Mail Compensation

United States et al v. Griffin et al., 82 Adv. Op. 555; 58 Sup. Ct. Rep. 601. [No. 63, decided February 28, 1938.]

Appeal from a decree of a specially constituted three judge district court which set aside an order of the Interstate Commerce Commission refusing, upon re-examination, to increase the allowance for railway mail compensation previously made by the Commission to the carrier. The jurisdiction of the district court was challenged for the first time on the appeal in the Supreme Court.

The opinion by MR. JUSTICE BRANDEIS holds that since jurisdiction of the Federal court as to the subject matter cannot be waived by the parties, that question must be examined and decided by the Supreme Court even though it has not been raised before. The opinion then concludes that the Interstate Commerce Commission order refusing upon re-examination to modify its previous order fixing the rates of compensation payable to railroads for the transportation of the mails, under authority of the Railway Mail Pay Act of July 28, 1916, is not an order of the Interstate Commerce Commission that may be enjoined, set aside, annulled or suspended by a district court under the provision to that effect of the Urgent Deficiencies Act of 1913, since it is not an affirmative order, and since, even if it were an affirmative order, it is not of such a nature that, in the public interest, it requires the extraordinary three judge court procedure and expedition of suits by direct appeal and otherwise which Congress intended to include within the scope of the jurisdiction conferred on the district courts by that and similar statutes. The opinion also concludes that the inapplicability of the Urgent Deficiencies Act does not preclude all judicial review, but that certain other statutes provide methods by which the action of the Commission may be brought before both the Court of Claims and the district courts. The opinion, therefore, concludes that the three-judge court lacked jurisdiction and the bill should have been dismissed.

MR. JUSTICE BLACK concurred in the result and with all of the opinion except that relating to other methods by which judicial review of the order may be obtained.

MR. JUSTICE REED took no part in the case.

The case was argued on November 19, 1937 and reargued on January 3, 1938, by Mr. Edward M. Reidy for the apppellants and by Mr. Moultrie Hitt for the appellees.

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THE FEDERAL JUDICIARY*

(Continued from March Issue)

By Hon. John J. Parker
Senior Circuit Judge, Court of Appeals for Fourth Circuit

I HAVE reserved to the last the most important thing that I have to say to you about the federal courts. That concerns the power of the courts to declare acts of Congress or the state legislatures unconstitutional and the various proposals to restrict that power. A consideration of this subject requires that we clarify our views as to the nature of the American government. It is, in the first place, a government of limited power. It is, in the second place, a dual government. And it is, in the third place, a government of divided powers. Sovereignty with us rests with the whole people. Our officers, national and state, are but agents of the people to govern under the charter of government given them by the people, which we call the Constitution and which is the supreme law of the land. That Constitution protects the rights of the citizen in certain fundamental matters against any exercise of governmental power whether by the state or the federal government. It divides the powers of government between the state and the nation, imposes limitations on both and forbids either to invade the province of the other. It divides the power delegated to the national government among the legislative, executive and judicial branches and establishes a system of checks and balances to prevent any branch from seizing supreme power for itself. The courts must apply the Constitution as the supreme law or the constitutional system simply will not work. If they were without power to declare acts of the state legislatures unconstitutional, local acts penalizing foreign corporations and interfering with interstate commerce would soon break it to pieces. If they were without power to declare acts of Congress unconstitutional, that body would be supreme. It could destroy the states and subject the other branches of government to its powers.

The argument that the power exists seems to me, on reason, on authority and on the necessity of the case, to be unanswerable; and I need not repeat the argument of Marbury v. Madison with which every lawyer is familiar. But inasmuch as certain persons have recently represented the doctrine of judicial review of legislative acts as originating with Marshall and as constituting judicial usurpation, I desire to call your attention to the fact that the doctrine was laid down in one of the arguments for the adoption of the Constitution. You will find it in No. 78 of the Federalist Papers. It is as follows:

"Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void must necessarily be superior to the one whose acts must be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.

"There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.

"If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

"Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental."

Even before this, Mr. Justice Iredell of North Carolina, in a letter to Richard Dobbs Speight of August 26, 1787, regarding the decision in Bayard v. Singleton, laid down the same doctrine with equal force. His remarks relate, of course, to the State Constitution but deal with the right of judicial review of acts of the Legislature and enunciate the same principles as contained in the Federalist and in Marbury v. Madison. Said he:

"I confess it has ever been my opinion, that an act inconsistent with the Constitution was void; and that the Judges, consistently with their duties, could not carry it into effect. The Constitution appears to me to be a fundamental law, limiting the powers of the Legislature, and with which every exercise of those powers must, necessarily, be compared. * * * The Constitution, therefore, *being a fundamental law*, and a law in writing of the solemn nature I have mentioned (which is the light in which it strikes me), the judicial power, in the exercise of their authority, must take notice of it as the groundwork of that as well as of all other authority; and as no article of the

*Concluding portion of address delivered at the meeting of the South Carolina Bar Association on Feb. 18, 1938. The first installment was printed in the March issue.

Constitution can be repealed by a Legislature, which derives its whole power from it, it follows either that the *fundamental unrepealable* law must be obeyed, by the rejection of an act unwarranted by and inconsistent with it, or you must obey an act founded on an authority not given by the people, and to which, therefore, the people owe no obedience. It is not that the judges are appointed arbiters, and to determine as it were upon any application, whether the Assemby have or have not violated the Constitution; but when an act is necessarily brought in judgment before them, they must, unavoidably, determine one way or another.

"In any other light than as I have stated it, the greater part of the provisions of the Constitution would appear to me to be ridiculous, since in my opinion nothing could be more so than for the representatives of a people solemnly assembled to form a Constitution, to set down a number of political dogmas, which might or might not be regarded; whereas it must have been intended, as I conceive, that it should be a system of authority, not depending on the casual whim or accidental ideas of a majority, either in or out of doors for the time being; but to remain in force until repealed by a similar appointment of deputies specially appointed for the same important purpose; and alterations should be with equal solemnity and deliberation made. And this, I apprehend, must be the necessary consequence, since surely equal authority is required to repeal as to enact."

Some well meaning people believe, in a general way, in constitutional principles, but seem to feel that we need no longer give them the force of fundamental law to be enforced by the courts. They have been so much disturbed by a few mistakes of the courts in applying the principles, that they wish to take the whole matter out of the hands of the courts and leave the observance of the Constitution entirely to legislative bodies. Others, while not going this far, would emasculate the great general clauses of the Constitution such as the "due process" clause of the Fifth Amendment and the "due process" and "equal protection" clauses of the Fourteenth. I am satisfied that these persons do not understand what would be the deadly consequences of the course they advocate. Never has there been greater need for constitutional protection of the principles of freedom than there is today. Less than ten years ago the Supreme Court had to invoke the due process clause of the Fourteenth Amendment to strike down a state statute which infringed upon religious freedom. Within the past three years the court invoked the same provision to hold invalid a state statute which infringed the freedom of the press. Two years ago it relied upon the same provision to set aside a conviction in the courts of a state which had been obtained upon a confession wrung from an accused by torture. And within the last year it invoked the same provision to hold invalid the statute of another state which denied freedom of speech. We flatter ourselves too much if we think that we have progressed to the point where we no longer need to guard against tyranny in government.

It is objected that the interpretation of the general clauses involves the application of the social philosophy of the judge and enables him to substitute his personal will for the will of the people. This is not a fair statement. It is true that in condemning legislation as lacking in due process or equal protection, the judge must apply standards; but these standards are the standards of the age in which he is living and not his personal views. True the court may sometimes make a mistake in determining or applying the standards, for all of us make mistakes; but where the final appeal is to reason, as it is under our judicial system, mistakes will be corrected when reason has time to assert itself. Where the appeal is to force, there is no corrective except force, and the reign of law and reason is at an end. The truth of the matter, of course, is that the standards by which the reasonableness of legislation is to be determined, the norms of conduct for the state, change with the changing conditions of society and it is important that judges keep step with the times; but it is infinitely better that reform be delayed for a few years than that we surrender the safeguards against tyranny which are contained in the right of the court to enforce the great general clauses of the Constitution.

Is this judicial tyranny? By no means. The courts have no power to make laws or to enforce them. Such power as they possess with respect to legislation is purely negative. When rights under a statute are asserted or effort is made to enforce the statute and rights under the Constitution are claimed inconsistent therewith, the extent of the power of the court is to protect the rights asserted under the Constitution and declare the statute void in so far as it infringes these rights. It may not enact another statute or otherwise change the law. In this connection let me quote again from No. 78 of the Federalist:

"Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

You will search history in vain for any instance where tyranny or despotism has been established by a court; and on the other hand, one of the first steps in the establishment of a despotism is to limit the power of the judiciary.

What then of proposals to require the concurrence of more than a majority of the judges of the Supreme Court for declaring an act unconstitutional? A statute to this effect would, of course, be unconstitutional since it would be legislative invasion of the judicial function. And a constitutional change making such a provision would be most unwise. The court should act as a body; and to permit a legislative act to prevail because supported by two or three judges when the majority of the court deems it violative of the fundamental law would tend to destroy respect for the legislation and for the processes of government. The Supreme Court should be composed of judges drawn from all sections of the country and representing different points of view. It is but to be expected that they should differ from time to time on constitutional questions; and the only safe thing to do is to let the decision of the majority be the decision of the Court. Errors will be made under any system; but there is less danger to the Republic in allowing a majority of the Court to invalidate a statute than in allowing a minority to invalidate the Constitution. The verdict of history is that even in the 5 to 4 decisions the majority of the Court have

generally been right; and nothing is to be gained by giving a minority the right to nullify not only the will of the majority on grave constitutional questions, but, if the majority be right, to nullify the Constitution itself.

Let me say, in conclusion, that these attacks upon the jurisdiction and power of the courts are matters as to which we must look for protection to the lawyers of the United States. The judiciary is the keystone of the arch of our constitutional structure, but of all the branches of government it is the most helpless. As Hamilton said, it has neither the sword of the executive nor the purse of the legislative. Its only strength lies in the confidence and support of the people; and for that support it must depend upon the leadership and intelligence of the bar.

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A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

ZONING, by Edward M. Bassett. 1936. New York: The Russell Sage Foundation. Pp. 275. *The Law and Practice of Zoning*, by G. Burchard Smith. 1937. New York: Baker, Voorhis & Co. Pp. 519.—Zoning covers a comparatively small field in the law of local government, but one of the most important from either a social, economic or constitutional point of view. As an extension of the police power by declarations of our state legislatures, its development marks an unique chapter in American lawmaking in which the courts were called upon to play a most significant role. To adjust legislation to meet the advanced social requirements of our modern cities within the traditional limitations of our federal and state constitutions, to define the relation between public and private interests, to work out a practical technique that would adequately protect property rights, were tasks that in the retrospect seemed almost impossible of solution, and the working out of most of these problems within a period of twenty years is a tribute to the adaptability of the American system of local government.

For the attainment of these ends no one man was more responsible than Edward M. Bassett, who was counsel for the New York Zoning Commission from its inception in 1913, and who was largely responsible for the legislation adopted in 1913 and later for the drafting of the uniform state enabling act sponsored by the Department of Commerce under Mr. Hoover. As counsel for scores of municipalities he guided the litigation that led to the ultimate approval of this new body of law which has made possible the preservation of urban property values and comprehensive planning for the future. Mr. Bassett's book, which summarizes the culmination of his life work, is at once a treatise and a compendium of the law in this field—in short, an indispensable aid to all who have to do with legislation or litigation in this field. For the practitioner it is sufficient to say that every decision of importance is cited by the author, with a complete index and bibliography of the subject. As to future legislation, especially in the field of the delegation of local administrative powers and their exercise by local officials, the most pressing problem today in the municipal as in other fields of government, one may find here the guide posts that point the way toward realizing efficiency compatible with the preservation of individual property rights. It seems not too much to say that Mr. Bassett's work is the most notable contribution to the law of municipal corporations that has been brought out in recent years.

Mr. Smith's book is an amplication of the work of Mr. Bassett in a quite limited field. It deals almost exclusively with the law of New York, the state which led in this type of legislation and in which the case law is the most voluminous. It serves the same function as a state annotation to a Restatement of Law by the American Law Institute. The author takes up in detail the Enabling Act, the Ordinance and its construction and the function of the Board of Appeals. A separate chapter covers the application of the local police power to garages, filling stations and oil tanks, a topic to which principles somewhat broader than those comprehended within the zoning power apply. In this venture the author is perhaps justified by the common misapprehension that the delegation of the power to zone carries with it necessarily a full grant of the police power over buildings, city planning and the regulation of streets and highways. But the primary aim of the author evidently is to provide a practical manual for the local lawyer. To this end the appendix includes the standard enabling act, copies of local laws of New York City relating to zoning, the rules relating to changes in the building zone map and a very complete set of forms used in the administration of zoning ordinances. A table of cases and a workable index are included, but no general bibliography of the subject, an omission fully justifiable in a local treatise.

In conclusion it may be noted that Mr. Smith's book supplements in a very practical manner the com-

prehensive work of Mr. Bassett. Similar local compendiums in other states would likewise prove useful to local practitioners. The general subject is much broader than state boundaries, and the adjustment of the general principles to the constitutional and statutory structure of the several states will be necessary in order to meet the newer questions as they arise from time to time. One of these that has not yet been fully worked out is the application of local zoning ordinances to other governmental bodies and even to the municipality itself. Another broader question that awaits solution is whether the time has not come to extend the zoning power so as to do away with continuing uses that lead to the permanence of blighted areas. Many problems of city planning are bound up with the law of zoning and those that may have to deal with them will be compelled to depend upon the law as worked out in the zoning field, as exemplified in the two books herein reviewed.

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Felony and Misdemeanor, by Julius Goebel, Jr. Vol. One. 1937. New York: The Commonwealth Fund. Pp. xxix and 455.—If we want to know why a rule of law has taken a particular shape, Holmes has told us, "we go to tradition. We follow it into the Year Books, and perhaps beyond them to the customs of the Salian Franks, and somewhere in the past, in the German forests, in the needs of Norman kings . . . we find out the practical motive for what now best is justified by the mere fact of its acceptance and that men are accustomed to it."[1] This is what Mr. Goebel has done in his illuminating study, *Felony and Misdemeanor.* His explorations on the history of our criminal procedure lead back into the Merovingian and Carolingian periods and to Visigothic and Roman sources. This work, which is the first of three projected volumes, ends where other histories on this subject commonly begin. It is a study of the medieval experiments in law enforcement that preceded the system which became operative in England. It includes the Norman Conquest of England and ends with the year 1135.

In the Frankish law Mr. Goebel finds two dominant strains, folklaw and king's law. He doubts whether originally there was any conception of the "public" order, except in treason and desertion. Folklaw is concerned with those wrongs for which the individual or his kindred may seek redress. In it the predominating factors are bloodfeud and composition, bargain procedure and individual prosecution. Revenge and feud are the crudest forms of action against wrongdoing, and the "second stage is the growth of composition which, gaining ground, eventually becomes the normal anticipation of the man injured."

The king's law was the beginning of a legal order, a system which involved sanctions controlled by authority. At first it was a very simple affair of a few procedures designed to cope with two situations, the thief and the professional malefactor. But this was the first step of an order which slowly widened its activities to encroach on the feud and the composition. The earliest legislation was aimed at the thief. Theft involved all the interferences with personality which today would be covered under larceny, robbery and burglary. The state took a hand against the thief because the feud, since the wrongdoer was unknown, could not reach him. But, though the Franks had something of a genius for devising legal institutions, these beginnings of a legal order were threatened to be swept away in the warfare of those turbulent days and particularly in the shock of the Norman invasion. It is doubtful whether any of them could have survived if it had not been that the procedures the Franks had set up had become firmly localized in their administration. This was accomplished through granting to local magistrates, both temporal and spiritual, the "power of government and justification in their estates, and then protecting the grantees through making them 'immune' from certain interferences of public officers."

The Merovingian kings acquired both the name and the idea of the immunity from the Romans. The immunity was granted by the crown. With the Romans an immunity charter grant "meant exemption from taxes and public services." In the early Frankish charters the same notion appears to have been present. But toward the middle of the seventh century a change in their content was effected by the "addition of a clause prohibiting entries by public officers upon the lands of the immunists for the purpose of hearing causes or making executions." Through the procedure of granting immunity charters to ecclesiastical authorities and to local potentates, the old methods of settling claims were maintained. And since these units, in the main, survived the shock of invasion and political anarchy of the latter ninth and tenth centuries, they were able to preserve their procedures during this period and to win recognition for them with the conquerors. Indeed, during the period of conquest and anarchy the local magnates assumed powers not granted. Here we find the beginning of the "great feudatories—the counties, duchies, bishoprics and abbeys."

In the tenth and eleventh centuries the immunities were the sanctuaries of ancient law. But during the upheavals of those turbulent times, they became degenerated. In the tenth century the authority of the crown was substantially destroyed and justice was determined by hundreds of individual immunists, or courtkeepers, with no check upon their rapacity. "Men were held to ransom for no reason except extortion," and their property was pillaged. It was wiser, if a man was strong enough, to settle with the sword. Complete forfeiture awaited him who had little or nothing with which to bargain. The period was marked by the growth of authority of the courtkeeper, and the development of two sanctions, forfeiture and escheat.

Evidences of a return to public order are found in what is known as the truce of God. This was a device initiated by the church, which alone in medieval Europe had an appreciation of social purpose. "The practical purpose of *pax Dei* in the outgoing tenth and the eleventh century was the creation of a general sanction against lawlessness." Mr. Goebel is of the opinion that this was the "starting point for all public enforcement." A war-weary and harassed people was ready to respond to this device of the church, the basic sanction of which was an oath to observe the peace. In its inception the truce of God was only a feeble ecclesiastical gesture but as its potentialities were recognized it gradually crept into secular law. "By slowly assuming the responsibility for the enforcement of the sworn peace, the Norman dukes succeed in establishing a prerogative over certain causes criminal that gives them an authority

1. Oliver Wendell Holmes, *The Path of the Law.* 10 Harv. Law Rev. 457, 469 (March, 1897); *Collected Legal Papers.* 1921. New York: Harcourt, Brace and Company, p. 186.

more far-reaching than they had therefore exercised as lords paramount."

There followed the amalgamation of the Frank-Norman and the Anglo-Saxon systems and the development of the king's peace with procedures adequate to promote a steady growth of criminal jurisdiction. After these developments, there no longer was any necessity to resort to the truce of God.

In writing this review the reviewer has departed from the conventional *modus operandi* of reviewers and has written instead a brief epitome of the study under consideration. Beyond this he has not felt himself competent to venture, other than to record his admiration of the unfailing integrity and clarity with which the author has charted a period of legal history heretofore explored only by continental historians. In a number of instances Mr. Goebel has challenged the conclusions of those writers. The reviewer is not qualified to judge the merits of these disagreements. He does, however, express the opinion that Mr. Goebel's study is an outstanding contribution. ALBERT J. HARNO.

University of Illinois.

The Robinson-Patman Act, by Wright Patman. 1938. New York: Ronald Press. Pp. v, 408.—The fact that the author of this book was a co-sponsor of the enactment whose interpretation he expounds, makes the book of more than ordinary interest. Students and the many attorneys and business men who have had their respective noses pushed forcibly against the difficult questions raised by the Act cannot ignore this commentary by the man who was in the forefront of the legislative battle which resulted in this newest piece of abracadabra. Happily, Representative Patman, unlike some in his position, has not simply traded upon this fact, but has instead put together a helpful analysis of this extremely involved piece of legislation.

The book is well organized. There are twenty-six chapters, each containing a brief discussion of a single topic. At the end of each chapter there follow specific illustrations in question and answer form of the principles laid down in the chapter. The questions which form the basis of these Socratic dialogues are apparently drawn from the multitude of inquiries with which the author has been besieged since the day in June, 1936, when the statute became effective. They are intensely practical and the answers are terse and clear and, for the most part, not subject to question.

The book has been equipped as a useful tool for the practitioner. To it are appended the text of the Act, the reports of the Senate and House committees to which the original bills were referred, the reports of the two conference committees which ironed out the differences between the Senate and House versions, and seventy pages of excerpts from the Congressional Record where are set out the sparks of debate, comment and explanation struck forth during the legislative process.

This is a helpful book. Only one word of warning need be given the user. Mr. Patman, quite naturally, has for the Act the fond affection of a father for his child. Upon occasion his interpretation of it seems to give more effect to what he and others interested in the passage of the legislation hoped to accomplish than to the meaning which less affectionate interpreters may be expected to give to the bare words of the statute. This is particularly apparent in the discussion of the "to meet competition" clause of Section 2(b) in Chapter 3, of Brokerage Allowances in Chapter 8, and of Wholesalers in Chapter 16.

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Business and the Robinson-Patman Law. Edited by Benjamin Werne. 1938. New York: Oxford University Press. Pp. xii, 296.—This miscellany on the legal and economic aspects of the Robinson-Patman Act contains sixteen diverse contributions. Several of these have been abstracted by permission from the June 1937 issue of *Law and Contemporary Problems*, which contained a collection of articles on the same topic. The remainder have been culled from other sources or are new material. Their general cold disapproval is in marked contrast to the enthusiastic sponsorship of Representative Patman in the book reviewed above.

Of interest to lawyers are the general discussion of the Act by Thurlow M. Gordon (*The Robinson-Patman Anti-Discrimination Act*, p. 39), the surveys of the first year of experience under the Act by Edwin George (*Business and the Robinson-Patman Act: First Year*, p. 83) and Wheeler Sammons (*Legislative History*, p. 99). Of special interest are Jacob K. Javits' treatment of the problems of the application of the law to the paper industry (*The Paper Industry*, p. 198), A. S. Aroson's exposition of the mechanics of cost defences under the Act (*Defences under the Robinson-Patman Act*, p. 212) and Blackwell Smith's discussion of the *Kraft Cheese* and *Bird* cases (*Effect of Two Pioneer Decisions under the Patman Law*, p. 236).

In this collection of current comment on the Robinson-Patman Act is a cross-section of the diverse and multitudinous outpourings to which the Act has given rise in recent months, even after the plethora of writings which followed its enactment in June, 1936, has somewhat fallen off. It will be of value chiefly to the practitioner who desires at least to glance at everything which comes from the presses upon this topic.

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Ground Water, by C. F. Tolman. 1937. New York and London: McGraw-Hill Book Company, Inc. Pp. XVII, 593.—"Study up the business involved in your case so well that your client finds you know more about the particular part of it that is at issue than he does." The advice impressed this reviewer when, as a law school student, he heard it in an address to the students by a Boston attorney who later became a member of the United States Supreme Court. Water-law matters are much in need of that ideal; and Professor Tolman's book can help toward it. Its author is Professor of Economic Geology in Leland Stanford University, This reviewer has had two occasions to acknowledge the value of his comments. *Fifty Years of Water Law, (1936), 50 Harvard L. Rev. 252, reprinted in 16 Oregon L. Rev. 203; Need of Unified Law for Surface and Underground Water, (1929), 2 Southern California L. Rev. 358.*

Being in the nature of a digest of much of the science of hydrology, the work's interest for water lawyers rests in portions rather than the whole. The following are portions which the present reviewer would emphasize:

1. What stands plainly over all water controversies is water's nature to descend from higher levels to lower, whereby its problems are essentially the same in all places, times and climates. The three principal aspects of this for groundwater are that it may be influent (sinking down from the surface), or it may be

in groundwater storage (confined or slowly percolating), or it may be effluent (oozing out at some lower level of the surface by seepage, or dissipating by evaporation or plant transpiration) pp. 34 and 468. Differences between localities are in degree and not in kind. According to Conkling, "In considering the different physical situations heretofore described in which groundwater of commercial importance is found, it is discovered that there are no essential differences." *Administrative Control of Underground Water, 62 Proc. Am. Soc. Civ. Engrs., (1936), p. 485, 493.* Florida and other areas adjacent to the sea may concern themselves with salt water getting into wells from overpumping, while in a certain California locality where overpumped wells draw their water from under San Francisco Bay their water remains fresh (Tolman, p. 471); but the difference is not a matter of East or South or West but a chance occurrence in the Bay's geological detail. Again, there has been considerable Western attention to water-spreading to recharge groundwater, but the history and development of the practice as related in Professor Tolman's pages 173 et seq. show some similar practice in Europe; and now it becomes a concern of the Mid-West drought areas (p. 25). The legal questions thereby presented, such as conservation-district organization, bonds and the like (for example, *Peacock v. Payne, (1934), 1 Cal. (2d) 104, 33 Pac. (2d) 667),* and the controversies of property rights through the possibility that improvement of regional conditions on a general scale may at the same time do harm at particular parts of the region (Tolman, page 178), are therefore not merely sectional in their nature. Professor Tolman in Chapter XVI treats the subject of Groundwater Inventory in universal and not merely sectional terms; followed by a review of the Groundwater provinces throughout the United States and the Hawaiian Islands in Chapter XVII. These reflect that although there is infinite variation of the details, there is universality of the fundamental principles, making the book useful everywhere, and counteracting the language in which law books have occasionally indulged that water essentials have some arbitrary basis in the West.

2. Many litigated occurrences of influence, storage and effluence of groundwater are in alluvial cones, to which the book gives much attention. It tells us:

> "Alluvial cones and fans are the great water producers in western United States and probably produce more water than all other types of confined-water systems combined. They are also of far more economic value, for they furnish the water necessary to bring into production the desert soils of unrivaled fertility. Pressure water in alluvial cones and fans has been studied in more detail than any other occurrence of confined water." Pages 364-365. See also pp. 172, 181, 253, 364 et seq., 374, 522, 529.

Figures illustrating alluvial cone structure are given on pages 369 and 372. We may add that the Director of the United States Geological Survey has noted to the present reviewer the following Water Supply Papers published by the Survey in which cross sections of alluvium-filled valleys in the western part of the United States may be found: No. 136, p. 126; No. 227, p. 38; No. 278, pp. 28, 36, 48; No. 320, p. 52; No. 343, Plate 2 (in pocket); No. 422, pp. 92, 93; No. 578, pp. 318, 473; No. 619, p. 4. For any lawyer who purports to handle water law, a knowledge of some thing about alluvial cones is on the "must" list; and Professor Tolman's book makes much authoritative information thereon accessible to him.

3. Other much-litigated occurrences of influence, storage and effluence of groundwater are in fractured zones of massive rock. Lawsuits abound where mine shafts or tunnels drain underground sources of springs and streams, such as *O'Leary v. Herbert, (1936), 5 Cal. (2d) 416, 55 P. (2d) 834.* A valuable presentation of the scientific knowledge is given in Chapter X.

4. The processes by which wells and other underground work interfere with natural conditions and produce cones of depression—(no relation whatever to alluvial cones)—is one which the lawyer may encounter in the reports, with limited understanding unless he refers to a book like Professor Tolman's to help him out by its discussion of water tables, their profiles and contours, in Chapter IX and XI. A chapter (XIV) deals with the like behavior of oil pools. According to Meinzer, "The coning produced by oil wells is essentially the same phenomenon as the coning of water wells"; and similarly Professor Tolman notes "the importance of an understanding of the principles of groundwater hydrology to petroleum geologists" (p. 426); which would embrace oil-law specialists.

5. Few branches of the law invoke discretionary authority as does water law. While any author is disposed to reach for certainty of exposition,—and while, instead of divining rods, modern prediction of the presence of water underground includes electrical methods and geophysical methods (Tolman, pp. 259-290),—yet there are many reminders in the book that the subject-matter of hydrology is basically indeterminate. There are reminders such as that "it is impossible to measure with any satisfactory degree of accuracy the amount of evaporation and transpiration over a large area; for instance, the watershed tributary to, and overlying, a groundwater basin," p. 35; that the movement of seepage "is complicated" and that the reason why "there is no mathematical equation capable of indicating the rate of seepage" is because of "an unknown variable," p. 44; that "past averages, however, do not indicate the future average rainfall with certainty," p. 76; that "the water level in wells may be fairly uniform and, again, striking differences in water level may occur in short distances," p. 300; that "up to the present time the methods of making a groundwater inventory have not reached the accuracy necessary to make them acceptable to all investigators. They often require investigations so extensive and long-continued that they cannot be applied except to studies of importance," p. 472. These and like passages confirm what one reads in law reports, as where geologists testified that a certain water occurrence was as much a surprise to them as to others, *O'Leary v. Herbert, supra;* or where the court's opinion concludes that it is always difficult even for the most experienced geologists to definitely determine groundwater's source, course or destination under certain circumstances, *Silver King etc. Co. v. Sutton, (1934), 85 Utah 297, 39 P. (2d) 682, 690;* that how long it will take for a particular groundwater change to come about "we doubt if anybody knows," *Berry v. Shell etc. Co., (1934), 140 Kan. 94, 33 P. (2d) 953,* or "probably no one knows," *Comar Oil Co. v. Blagden, (1934), 169 Okla. 78, 35 P. (2d) 954, 955.* Whoever is to have charge of legal adjustment in the matter needs a considerable degree of discretion to bring, out of indefinite circumstances, the best compromise that he can. There is much in Professor Tolman's work in which this indeterminate nature of water resources is revealed.

6. It is to be added that the book does not develop this to the full extent. More serious legal issues come out of this aspect of hydrology than out of any other. In particular, there is what someone has called

"the speed and fury of the river's flux, or the miracle of its continuous body." A stream is only a perpetual renewal of transient contributions—groundwater entering or leaving the bed being an important class thereof—which the eye looking at the stream unites into an apparently single body as it does the succession of impressions on the film of a motion picture. The singleness is as much an unreality in the one case as in the other. This has led to much groping at legal water adjustments by various processes of dividing-up a stream-body into mathematical or physical parts like land lots. They all amount to trying to divide-up an illusion. This nature of water resources makes the subject particularly contentious, partly because of common failure to recognize it, partly because of difficulty, when recognized, to fit law to it. Another set of legal issues comes from the fact that, due to the alternation of influence (seepage into the ground), and effluence (oozing out), water once used is not necessarily ended. It usually reappears at a lower level, with conflicts of interest over this "return flow" between claimants where it sank in and those below the places where it came out. Such conflicts are increasing in number with the country's increased development, and are drawing attention to the need of public administration to coordinate and secure the maximum number of successive uses of the same water over again that can exist comfortably together, although the physical events involved are seldom capable of close determination. Another legal concern is with the amount of monetary damages, in case a dispute is to be adjusted by money compensation instead of in kind. There is reason to believe that some hydrological principles bearing upon monetary damage can be formulated.

The present reviewer has ventured to present these and similar law-contacts with hydrology in the two law articles above mentioned. Professor Tolman's plan does not lead him into this direction, because his preface, p. VIII, notes that he is writing for the engineer and geologist primarily, with lawyers taking the benefits that fall their way incidentally. The engineer and geologist is most interested in settled matters that he can build upon and whose way is clear. The lawyer begins mostly where they leave off. His province is with the matters which provoke controversies. Sometimes the controversy is because a principle is mooted. Often it is over the application of even admitted principles to particular instances. To have the hydrologist expound the fact and extent of indeterminateness that multiplies controversies would assist at least equally with having expounded what is known and settled. As the concern of the law is with controversy, more attention to matters of the indeterminate type than the book gives would have been welcome.

7. But to dwell on this feature, where there is already enough to be thankful for, would be ungrateful. In addition to the useful portions already noted, there are plentiful references in the book to the scientific literature. Particular reliance is placed upon the pioneer work of Oscar Edward Meinzer, Geologist in Charge of the Division of Groundwater, U. S. Geological Survey. There are, in addition, chapters contributed to the book by specialists, and abundant photographs, figures and other illustrations. The introduction points out (p. 6) that it would be better for the reader to have some previous acquaintance with the terminology and elements of general geology and of engineering. A glossary at the end extends some help.

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San Francisco.

International Law, by L. Oppenheim. Vol. I—Peace. 5th ed. 1937. Edited by H. Lauterpacht. New York: Longmans, Green and Co. Pp. lvi, 819. Index.

The Law of Nations: Cases, Documents, and Notes, edited by Herbert W. Briggs. 1938. New York: F. S. Crofts & Co. Pp. xxix, 984. Index.

The literature in the field of international law has recently been enlarged by the publication of a new edition of a general treatise long recognized as outstanding, and an interesting new case book. The fifth and latest edition of Oppenheim's monumental *International Law* is, with the appearance of volume one on Peace, now complete, the fifth edition of the second volume dealing with Disputes, War and Neutrality having appeared in 1935. Both volumes were edited by Professor Lauterpacht. The first edition of this work was published in 1905-06 and the second edition, prepared by the author himself, appeared in 1912. The third edition, begun by Oppenheim, was completed after his death by Mr. Roxburgh in 1920-21. The fourth edition, appearing in 1926-28, was edited by Professor Arnold D. McNair. It may be said without hesitation that in the present edition, and more particularly in the volume here under review, Professor Lauterpacht has more than lived up to the high standards of erudition, meticulous care for detail, and lucidity of expression established by the original author and previous editors, and that students, teachers and practitioners of international law everywhere, but particularly in the English-speaking countries, owe him a deep debt of gratitude for having so brilliantly brought up to date and thus given new vitality to this outstanding work on international law. It is, incidentally, eminently fitting that at the moment of concluding his task Professor Lauterpacht was selected to fill the post which Oppenheim himself held from 1908 until his death in 1919, that of Whewell Professor of International Law in the University of Cambridge.

It is, of course, impossible within the limits of this review to outline the contents of this volume, or to give detailed consideration to the multiplicity of contributions of new material made by the present editor. For those already familiar with Oppenheim's treatise it will suffice to say that Professor Lauterpacht has adhered strictly to the general outline, classification of topics, and system of treatment established by the original author and followed by preceding editors. He has brought the extensive and invaluable bibliographies at the head of each topical division up to date, and has added a wealth of references to practice, jurisprudence and the literature in new footnotes. Furthermore, where more recent developments in the international field have seemed to him to render it necessary, he has not hesitated to alter the text in the interest of accuracy or clarity, to express views in conflict with those propounded in former editions, and to add wholly new material. Many, though not all, of these changes appear in some fifty new sections which are listed in the preface, and which deal with various aspects of such topics as the sources of international law, the relation of international law to municipal law, codification of international law, the nature and effects of recognition, the new doctrine of non-recognition, the new status of the Holy See, subversive activities against foreign states, renunciation of war and the acquisition of title by conquest, preparatory work in the interpretation of treaties, and a number of others. There are also added new sections on the League of Nations and the International Labor Organization. In order to ac-

commodate this new material and yet not increase proportionately the size of the volume, over a hundred pages of text and footnotes found in the fourth edition were omitted, and a smaller, though very legible, type was used. The total result is a new, up to the minute, exceedingly useful and useable Oppenheim—*Lauterpacht's Oppenheim.*

The latter appellation is particularly appropriate in view of the fact that, like previous editors of this same treatise, Professor Lauterpacht in preparing the present edition found it in his opinion impracticable everywhere to distinguish, by use of brackets, different type or otherwise, between the text of the original version and the changes introduced by himself. The result is that the person interested in knowing or citing Oppenheims' own views on a particular point cannot finally rely upon the fifth edition of his work; he can discover them only by means of a page by page comparison with the third or preferably the second edition. This method of editing a well-known treatise has come in for some criticism in the past, one reviewer of the fourth edition predicting that if it were continued "and a fifth edition should be issued by still another editor, the original point of view of Oppenheim, which a reader might wish to know, would require considerable research to discover."[1] While this may not be a matter of as great significance for the practicing lawyer as for the research scholar, it is obvious that both must bear it in mind when using the new as well as the fourth or third editions of Oppenheim, and that both should be scrupulously careful, in making citations to the work, to include complete reference to edition and editor.

Needless to say, international lawyers will not always be in unanimous agreement with some of Professor Lauterpacht's views. To cite but a few instances, some may, for example, quarrel with his acceptance of "general principles of law" as a source of international law additional to custom and treaties (pp. 26-28); or his rejection of Oppenheim's strict dualistic theory of the relation of international to municipal law in favor of the view that it is "a rule of positive law" that international law is a part of municipal law and that "it is impossible to accept the view that rules of International law cannot, without express municipal adoption, operate as part of Municipal Law" (p. 40); or his statement that the granting or withholding of recognition is not entirely a discretionary act (pp. 121-122); or again his opinion, sanctioned by the Permanent Court of International Justice but still regarded with skepticism by some Anglo-American lawyers, that preparatory work (*travaux préparatoires*) "may be resorted to for the purpose of interpreting controversial provisions of a treaty" (p. 756). But differ though they may on individual points of doctrine, all will undoubtedly be in agreement that Professor Lauterpacht has performed a difficult task in an admirable fashion and that his fifth edition of Oppenheim must be included in any library of international law worthy of the name.

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The second of the volumes here under review will perhaps be of more interest to members of the teaching profession than to those engaged in active legal practice. Starting with the assumption, heartily approved by the reviewer, that "the law of nations is probably best taught by the case method, but the student needs more than cases" (p. V), Professor Briggs in his *The Law of Nations* has, as the subtitle of the volume indicates, given us more than just another case-book. There are, to be sure, between 150 and 160 cases included among the materials illustrative of the eighteen broad and more or less typical topics in the law of peace, war and neutrality which form the chapter titles of the book. (There are about 260 in Hudson, *Cases on International Law,* 190 in Dickinson, *Law of Nations,* and 186 in Fenwick, *Cases on International Law.*) In addition to the cases, however, there are included pertinent excerpts from treatises on international law and from diplomatic correspondence; some 50 "Documents" in the form of treaties, excerpts from statutes, League publications, resolutions of the Institute of International Law, and the like; and finally 89 "Notes" by the editor.

The latter "Notes" constitute one of the most interesting and, in this reviewer's opinion, one of the most useful features of the book. Usually coming after the cases and other matters illustrative of a particular point, these essays serve in the first place to clarify that material and to suggest its significance and relation to the larger background of which it is but a part. In addition, these Notes "digest cases in accord or conflict with those reported, . . . abstract or quote from contemporary American, British, French and German writings on the principles of international law, and . . . present a synthesis of material not ordinarily found in either case-books or the standard general treatises on international law. No attempt has been made in the Editor's Notes to express an opinion on every issue raised in the cases reported, but an effort has been made to furnish a guide through a vast bibliographical jungle and to indicate present trends and the lines along which the law of nations is in practice developing." (p. V.) In the latter connection, it may be remarked, Professor Briggs quotes liberally from the publications of the Harvard Research in International Law. These Notes, it would seem, should be of infinite value to the student who, without such a guide, is likely to become wholly confused by the mass of materials in the ordinary case-books and who is not likely to have that confusion wholly dispelled by class room lectures and the use of a text book unrelated to the case-book.

Probably no selection of cases will ever meet with everyone's approval. The present editor seems, however, to have chosen well and with care, and one will find in his volume most of the leading cases which have come to be regarded almost as "standard equipment." There are decisions of the Permanent Court of International Justice, the Hague Court of Arbitration, the Mexican-American, German-American, British-American and other mixed claims tribunals, as well as of the domestic courts of the United States, Great Britain, France, Germany, and Switzerland. Professor Briggs has, however, definitely given preference to decisions of international tribunals over those of national courts, and has frankly omitted "from a book devoted primarily to the public law of nations" a number of municipal court cases commonly found in case-books—as, for example, those interpreting the nationality statutes of the United States. Under the heading Nationality there appear (in addition to Editor's Notes on Nationality and Dual Nationality containing many references to other cases and materials) only the following: decision of the Permanent Court in the case of the *Tunis-Morocco Nationality Decrees, Stoeck v. Public Trustee, Great Britain (R. J. Lynch Claim) v. United States,* Treaty Concerning Minorities in Poland, and

1. George Grafton Wilson, reviewing Vol. II, 4th ed. 21 *Amer. Jour. of Int. Law* (1927), 397-398.

the Hague Convention (1930) on Certain Questions Relating to the Conflict of Nationality Laws. Again, for example, under extradition there appears only *Factor v. Laubenheimer,* although the succeeding Note is rich with references to and digests of other cases.

Enough has been said to suggest that Briggs' *The Law of Nations* is not a case-book replete with cases illustrating those points of international law likely to be met by the lawyer practicing before domestic courts. For that reason the book would not be suitable for use in courses on international law taught in law schools or probably even in some of the more extensive courses taught in departments of political science. It would seem, however, that it comes very close to being the answer to the long-felt demand for a case- and document-book frankly designed only for courses on international law offered in the literary colleges and intended to provide a general rather than a technical knowledge of the entire field. Teachers of such courses should be interested in Professor Briggs' book.

VALENTINE JOBST III
University of Illinois

Summaries of Articles in Current Legal Periodicals

BY KENNETH C. SEARS
Professor of Law, University of Chicago

ADMINISTRATIVE LAW

ADMINISTRATIVE TRIBUNALS—Organization and Reorganization, E. Blythe Stason, 36 Michigan L. Rev. 533. (F. '38; Ann Arbor, Mich.)

If one is interested in the current plan to reorganize the administrative set up in Washington, D. C., or if he is interested in reading a survey of the general nature and of the problems presented by the functioning of our national administrative tribunals, he will enjoy this clear presentation by Professor Stason. A distinction is made between administrative *agencies* which execute "completely defined provisions of the law" and administrative *tribunals* which in addition to executing law, exercise powers that normally belong to the legislative and judicial departments. Opposition is expressed to that part of the report of the President's Committee on Administrative Management which desires to shear off executive and legislative powers from these administrative tribunals, transfer them to the major executive departments of the national government, and leave the tribunals with their judicial powers. It is not practical to divide and separate powers of government in this way. As a substitute method it is suggested that instead of a single formula for the entire administrative organization, each tribunal or agency should be analyzed. If it proves to be "primarily administrative", place it in an executive department; if "*primarily* legislative", place it within "an independent commission reporting to Congress"; if *primarily* judicial", keep it independent of an executive department but subject to judicial review. Query: how much agreement will be secured in determining whether the various administrative agencies and tribunals are "primarily" in one of three classes?

ALIENS

Recent Developments in the Deportation Process, Reuben Oppenheimer, 36 Michigan L. Rev. 355. (Ja. '38; Ann Arbor, Mich.)

The author has reviewed the cases and other pertinent governmental activity affecting aliens during the last five years in order to complete the story as told in the report of the National Commission on Law Observance and Enforcement and in other studies of the problem. Relatively few lawyers, perhaps, have any considerable interest in this activity from the point of view of fees to be earned; but all who are interested in an important governmental problem will read this article with interest. The style is such that even a tired lawyer can follow the story with ease. Its importance is shown by the fact that during the five year period "investigations contemplating warrants of arrest averaged over 119,000 a year". Then in the deportation process one observes the administrative process operating in a manner less restricted by ordinary judicial restraints than perhaps any other important national governmental activity. Here the inspector acts as investigator, prosecutor, witness, and judge. Recent departmental administration is commended as an improvement upon previous administration and the greatest need now is the passage of corrective legislation by Congress. The author failed to comment upon the opposition to legislative reforms that has appeared in Congress with certain members who have adopted the method of wrapping themselves in the flag of the country and of shouting about their patriotism.

CONSTITUTIONAL LAW

Federal Sovereignty and National Needs After One Hundred and Fifty Years, Ernest C. Carman, 11 So. California L. Rev. 215. (Ja. '38; Los Angeles, Cal.)

This brief article advocates an amendment to section 8 of article I of the national constitution. The author wishes the national government to have power over "the entire domain of government not within the competency of the States," or, in affirmative language, power "over all matters of national concern whatsoever". This desire is based in the main upon the attitude of the Supreme Court before the election in 1936 and is not satisfied with the considerable reversal of form that occurred in the 1937. Appeal is made to the enormous change in the way of life that has come since 1787 and to the vision of Hamilton, Randolph, and particularly Lincoln. The latter one told Congress that "Whatever concerns the whole should be confided to the whole—to the General Government—while whatever concerns only the State should be left exclusively to the State." The proposed amendment, however, "shall never be construed as limiting the power of any State always to maintain peace and good order within its borders".

CORPORATIONS

Changes in Corporate Reorganization Procedure Proposed by the Chandler and Lea Bills, Cloyd Laporte, 51 Harvard L. Rev. 672. (F. '38; Cambridge, Mass.)

Lawyers in the larger cities who deal with corporate reorganizations will probably enjoy Mr. Laporte's short and clear analysis of the chapter X of the Chandler Bill, the Lea Bill, and to some extent the Barkley Bill, otherwise known as the "Trust Indenture Act of 1937". The Chandler and Lea bills would provide, if properly amended, these reforms: (1) submission of the more important plans of reorganizations to the Securities and Exchange Commission for advisory reports; (2) appointment of "independent" trustees as a rule with exceptions within judicial discretion; (3) disclosure of information by solicitors of proxies, deposits, and assents; (4) restriction of the solicitation of assents in a federal court proceeding to a court-approved plan; and (5) making the reorganization trustee the central agent for investigation of the debtor and preparation of reorganization plans. Objections are offered to enacting (1) that an "independent" trustee shall be appointed in all cases where liabilities exceed a "low minimum"; (2) that persons connected with the debtor or its bankers may not serve on reorganization committees; and (3) that would require the committee members to finance themselves in their operations and bar them from selling their own holdings regardless of their personal necessities.

In connection with Mr. Laporte's article readers are directed to three other very interesting articles: The Securities and Exchange Commission's Reform Program for Bankruptcy Reorganizations, E. Merrick Dodd Jr., 38 Columbia L. Rev. 223; "Democratization" of Corporate Reorganizations, Robert T. Swaine, 38 Columbia L. Rev. 256; The Securities and Exchange Commission and Corporate Reorganization, Joseph L. Weiner, 38 Columbia L. Rev. 280. The first supports in general the reform program of the Commission as proposed in the Chandler and Lea bills; Mr. Swaine is highly critical; but Mr. Weiner answers Mr. Swaine and supports the objectives of the Commission.

LABOR RELATIONS

The Appropriate Bargaining Unit Under The Wagner Act, William Stix, 23 Washington University L. Quar. 156. (F. '38; St. Louis, Mo.)

In determining the appropriate unit for bargaining purposes, the National Labor Relations Board has attempted to consider each case on its own merits rather than to apply a set of general rules. Consideration is given to a large number of decisions rendered by the Board in its brief career but it is difficult to see the forest, if there is one, for the trees. There is apparently no ideal unit for collective bargaining. Realities, not theory, are the guide. As to the charge that the decisions of the Board have favored the union, the answer is that it is the policy of the act to facilitate organization and collective bargaining of the workers.

SIT-DOWN STRIKES

Injunctions Against Sit-Down Strikes, H. L. McClintock, 23 Iowa L. Rev. 149. (Ja. '38; Iowa City, Ia.)

A short, clear article is this one dealing with a question that Madame Perkins did not understand to have been finally decided about a year ago when the epidemic was stirring the passions. So a calm survey of the legal and practical situation should be welcome. However, attention is confined to the use of the injunction to prevent this form of strike. No case on this has yet been decided by an appellate court. The conclusions are: (1) the sit-down strike is illegal; (2) the remedy at law in a sit-down strike is sufficiently inadequate, at least where summary proceedings for possession are not available, to authorize a court of equity to take jurisdiction; (3) under such circumstances there is ample authority for the issuance of the injunction except "where the plaintiff comes into court with unclean hands because his illegal or inequitable conduct has provoked the strike"; but (4) the injunction should be refused for the additional reason that under the particular circumstances it is improbable that the injunction can be enforced. It "must be remembered that the United States has been the only country which has attempted on a large scale to control industrial disputes by means of the equitable injunction, and our handling of that problem has not been so much more successful than that of other countries as to indicate that our method is the only practicable one".

TAXATION

Tax Evasion and Tax Avoidance, Montgomery B. Angell, 38 Columbia L. Rev. 80. (Ja. '38; New York City.)

The message of the President and the report of the Secretary of the Treasury last June calling for amendments to the Revenue Act are criticized for their failure to distinguish between wrongful evasion and permissible, non-wrongful avoidance of taxes. The President objected to "avoidance and evasion of tax liability" that "are definitely contrary to the spirit of the law"; the Secretary specified certain cases "in the catagory of a legal though highly immoral avoidance of the intent of the law". The author counters with a comment by Mr. Justice Holmes that there is nothing wrong in a person availing himself "to the full of what the law permits"; that evasion "is on the wrong side of the line indicated by the policy if not by the mere letter of the law". Yet the author in thereafter bringing Holmes to the argument seems to ignore what Holmes said about the "policy" of the law. In any event, it is claimed that the problem is really one of legislative draftsmanship and that the Treasury is not free from responsibility because "it is often the Treasury officials who formulate the bill". And the 1937 Revenue Act "is as involved and complicated a piece of legislation as ever emerged from the hands of Congress."

WORKMEN'S COMPENSATION

Would a Compulsory Workman's Compensation Act Without Trial by Jury Be Constitutional in Massachusetts? by Samuel B. Horovitz and Joseph Bear, 18 Boston U. L. Rev. 1. (Ja. '38; Boston, Mass.)

It should be of general interest to read of the recent experience in Massachusetts with its optional workmen's compensation act. From 1912 to 1929 the number of employees covered by the act gradually increased; but some large employers, the railroads and the New England Telephone and Telegraph Company, never covered their employees. In 1929 a reverse movement started and a large number of employers have withdrawn their compensation insurance. It is

the depression. Substitute schemes were tried by some employers but in the end "the employer himself was to act as the Industrial Accident Board and pay according to his own judgment". The result is that over one hundred thousand injuries are occurring annually; about a half of the employers are without insurance; and for practical purposes their employees must wait three or four years for trial and show negligence in order to recover. The remedy is a compulsory workmen's compensation act. That such an act does not violate due process has been settled by the national Supreme Court and the authors are satisfied that there would be no violation of the provision for jury trial in the Massachusetts constitution.

Leading Articles in Current Legal Periodicals

Air Law Review, January (New York City)—Aeronautics in 1937, Reginald M. Cleveland; The Early History of Electrical Communications, by Leslie Bennett Tribolet; Guest Cases in Aviation Law, by John A. Appleman; Aviation in Colombia, by Anyda Marchant.

Canadian Bar Review, February (Ottawa)—Irrevocable Letters of Credit in Modern Commerce; Some Practical Considerations, by Professor Philip W. Thayer; Some Considerations on the Origins of Habeas Corpus, by Maxwell Cohen; Loss of Expectation of Life, by F. Andrew Brewin.

University of Chicago Law Review, February (Chicago, Ill.)—Jurisprudence, The Crown of Civilization, by D. J. Swift Teufelsdrockh; The Economic Theory of Wage Regulation, by Paul H. Douglas; Bankruptcy and Reorganization: A Survey of Changes. II, by Edward H. Levi and James Wm. Moore; Legislation and Risk of Loss Cases, by Robert Diller.

Columbia Law Review, March (New York, N. Y.)—Stock Market Manipulation, by A. A. Berle, Jr.; Sociological and Comparative Aspects of the Trust, by Arthur Nussbaum; Psychological Foundations for the Fiduciary Concept in Corporation Law, by Chester Rohrlich and Edith Rohrlich.

Commercial Law Journal, March (Chicago, Ill.)—The American Ideal, by Senator Joseph C. O'Mahoney; The Lawyer's Place in the Coordination of Government and Business, by J. K. Javits; Chicago Bar Association and Collection Agencies, by Alfred J. Parker; Review, Tennessee Unauthorized Practice of Law Case, by Paul A. Green; Florida Rejects Rules for Bar Integration, by Herbert U. Feibelman.

Cornell Law Quarterly, February (Ithaca, N. Y.)—The Admiralty Law of Salvage, by G. H. Robinson; Revised Edition of Williston on Contracts: A Review, by Horace E. Whiteside; Should the States Be Permitted to Make Compacts Without the Consent of Congress? by Ernest C. Carman; Landlords, Bankruptcy, and 77B, by Martin A. Roeder.

Journal of Criminal Law and Criminology Including the American Journal of Police Science, January-February (Chicago, Ill.)—Responsibility and Punishment, by Ledger Wood; Cooperation Between Press, Radio and Bar, by Paul Bellamy, Stuart Perry and Newton D. Baker; Criminal Mobility, by Stuart Lottier; Individualized Treatment of Criminals, by Logan Wilson; Indictable Offenses in Alberta, by Arthur Beaumont; Surgical Treatment, by Marie E. Kopp; Intelligence of Illinois Prisoners, by Andrew W. Brown and A. A. Hartman; Stolen Automobile Investigations, by William J. Davis; Effectiveness of Police Functioning, by Spencer D. Parratt.

Illinois Law Review, February (Chicago, Ill.)—Taxing the Income from Tax-Exempt Securities, by Charles L. B. Lowndes; Economic Security and the Young Lawyer: Four Views, by Stephen Love, Karl Llewellyn, Osmond K. Fraenkel, Malcolm Sharp; Some Practical Aspects of the Doctrine of Impossibility, by J. Denson Smith; The Illinois Retailers' Occupation Tax Act: Some Further Decisions, by Martin Philipsborn, Jr.; Recent Ideologies in the Law of Succession to Property, by Paul L. Sayre.

Kansas City Law Review, February (Kansas City, Mo.)—Constitutional Limitations Upon Municipal Debt in Missouri, by Floyd C. Holmes; A Landlord's Tort Liability to Tenants and Invitees in Missouri, by Robert E. Rosenwald; The Nature and Implications of the Police Power, by Thomas J. Pitts.

Law Society Journal, February (Boston, Mass.)—Bar Integration—Judicial Selection, by Justice Henry T. Lummus; Webster Thayer—The Last Phase, by George R. Farnum; The Massachusetts Blue Sky Law, by Joseph B. Abrams; The Shopbook Rule in Massachusetts, by Elmer Brown; Our Depressions—Their Causes and Cures, by Alvah L. Stinson; The Value of Federal Housing, by Samuel Rosen; On Crime, by Hon. Homer Cummings.

Legal Notes on Local Government, March (New York, N. Y.)—Conditional Sales Contracts in Municipal Purchases—Financing Self-Liquidating Activities, by Ambrose Fuller; Survey of Current Case Law, Legislation and Literature.

Marquette Law Review, February (Milwaukee, Wis.)—The Functional Approach to the Wisconsin Test for Insanity, by Francis X. Krembs; Joinder of Policyholder and Insurer as Parties Defendant, by John A. Appleman.

Massachusetts Law Quarterly, January-April (Boston, Mass.)—The Work of the Supreme Judicial Court, by Henry T. Lummus; The Regulation of Practice and Procedure in Massachusetts; The Future of Judicial Reporting?; The Problem of Opinions; Declaratory Treasury Rulings—A New Application of Declaratory Procedure (Extract from an Article by Herman Oliphant, General Counsel for the Treasury Department); The Bill for a Business Manager of the Federal Courts; Nathan Dane and the Ordinance of 1787 for the Government of the Northwest Territory.

Michigan Law Review, February (Ann Arbor, Mich.)—Administrative Tribunals—Organization and Reorganization, by E. Blythe Stason; Depletion of Oil and Gas Properties for Income Tax Purposes, by John W. Beveridge.

Minnesota Law Review, February (Minneapolis, Minn.)—The Tax Provisions of the Social Security Act, by Ralph A. Gilchrist; A Creditor's Rights in Securities Held by His Surety, by Edward G. Jennings.

Minnesota Law Review, March (Minneapolis, Minn.)—The Governors' Constitutional Powers of Appointment and Removal, by John Murdoch Dawley; Is Equity Decadent? by William F. Walsh; Causes of Action Blended, by Carl C. Wheaton; Jury Trial in Will Cases in Minnesota, by Edward S. Bade.

New York University Law Quarterly Review, January (New York City, N. Y.)—Through Title to Contract and a Bit Beyond, by K. N. Llewellyn; The Liquor License System—Its Origin and Constitutional Development, by Frederick A. Johnson and Ruth R. Kessler; The Scope of Certiorari in the Light of the Olmstead and the Tipaldo Cases, by Forrest Revere Black.

University of Pennsylvania Law Review, March (Philadelphia, Pa.)—Minority Rule and The Constitutional Tradition, by Max Lerner; Pennsylvania Rules Governing the Allocation of Receipts Derived by Trustees from Wasting Property, by Robert Brigham; Recent Developments in Federal-Municipal Relationships, by E. H. Foley, Jr.

Philippine Law Journal, January (Manila, P. I.)—The Constitutional Provision Regarding Self-Incrimination in Its Relation to Evidence and Procedure, by Maximo C. Montenegro.

University of Pittsburgh Law Review, January (Pittsburgh, Pa.)—Personal Property Taxes in Pennsylvania, by S. Leo Ruslander; Punitive Damages for Defamation in Pennsylvania.

Rocky Mountain Law Review, December (Boulder, Colo.—Regulation Penalty or Income Tax? by George T. Evans; Express Trusts in Colorado, by Alan L. Gornick.

Southern California Law Review, January (Los Angeles, Cal.)—Federal Sovereignty and National Needs After One Hundred and Fifty Years, by Ernest C. Carman; The Enforcement of Money Judgments in California, by Joseph I. King.

Temple Law Quarterly, February (Philadelphia, Pa.)—Federal Income Tax on Decedents' Estates During Period of Administration, by Fred L. Rosenbloom; Trust Receipts, by Harold F. Lusk; The Personal Insurance Trust in Pennsylvania, by Sidney Schulman.

Tulane Law Review, February (New Orleans, La.)—University Legal Education and the American Bar, by Arthur T. Vanderbilt; An Economic Interpretation of the Doctrine of Delegation of Governmental Powers, by John D. McGowen; The Corporation Law of Venezuela, by Henry Paine Crawford.

United States Law Review, January (New York City)—The Unsolved Problem of Monopoly, by Homer Cummings; The Causes of Popular Dissatisfaction with the Administration of Justice, by Roscoe Pound.

Virginia Law Review, March (Charlottesville, Va.)—The Power of the State and Federal Governments to Tax One Another, by William R. Watkins; Majority Control in Compositions: Its Historical Origins, by Israel Treiman.

Washington Law Review, January (Seattle, Wash.)—Recovery for Injury Without Impact: The Washington Cases, by John W. Richards; Supplemental Washington Annotations, Restatement of Contracts, by Warren Shattuck.

Washington University Law Quarterly, February (St. Louis, Mo.)—The Appropriate Bargaining Unit Under the Wagner Act, by William Stix; The Law of Hybrid Securities, by Rudolf E. Uhlman.

Yale Law Journal, February (New Haven, Conn.)—A Discussion of Current Developments in Administrative Law: Foreword, by Felix Frankfurter; Administrative Policies and the Courts, by James M. Landis; Concepts and Policies in Anglo-American Administrative Law Theory, by Ralph F. Fuchs; Administrative Justice and the Role of Discretion, by Robert M. Cooper; Administrative Finality and Federal Expenditures, by Harvey C. Mansfield; The Securities Exchange Act of 1934: An Experiment in Administrative Law, by Roland L. Redmond; Prospectus for the Further Study of Federal Administrative Law, by A. H. Feller.

INFLUENCE OF AMERICAN BAR ASSOCIATION ON PUBLIC OPINION AND LEGISLATION*

AN ESTIMATE, BY WILLIAM L. RANSOM

THE historian who makes a contemporary survey of a Nation or an institution is fortunate if he can write as of the end of an era or an epoch. When M. Louise Rutherford began her assembly of material for an appraisal of the influence of the American Bar Association upon public opinion and legislation, it is probable that she had chiefly in mind a new task of research and evaluation which might win acceptance in partial fulfillment of the requirements of the Faculty of the Graduate School of the University of Pennsylvania for the degree of Doctor of Philosophy. By the time her work had been completed and accepted after defense of thesis, her dissertation in political science took on an added and unforeseen historical value, in that she had surveyed and appraised a completed period in the growth and work of the Association—a period during which the National organization of the Bar had proceeded, for nearly sixty years, in a belief that the profession of law was best represented and led by an aristocracy of self-selected leaders "at the top," rather than by the development and expression of the views of the whole membership, directly and through delegates chosen by the membership. Of the Association which began with a small and selected group at Saratoga Springs, New York, in 1878, and gained gradually in influence, usefulness and membership, until finally the State and local Bar Associations joined hands with the rank and file of American Bar Association members in forcing the adoption of a representative structure of organization in 1936, Mrs. Rutherford has written a complete chronicle and has rendered a timely service in so doing.

Her data were evidently assembled in 1935 and early 1936. When the government of the Association was thoroughly reorganized and largely decentralized in August of 1936, she added text and foot-notes which told of the changes. But the volume went to press before anyone had an opportunity to observe and estimate the effects of the 1936 transition. In this respect, she is fortunate, inasmuch as her volume will be accepted as the unbiased and authoritative account of the work and influence of the Association during the years when it was led and controlled by a numerous, disinterested, and largely unselfish group of public-spirited lawyers who were willing to devote their time and energies to its comprehensive programs. The appraisal of the Association as a federation of State and local Bar Associations governed by delegates elected at home in the States and localities, and resorting in major controversies to mail-ballot votes of the membership, will be written at some future time as a separate narrative.

*The influence of the American Bar Association on Public Opinion and Legislation. By M. Louise (Mrs. John Brisben) Rutherford, LL.B., Ph.D., of the Philadelphia Bar. The Foundation Press, Inc., Chicago, Illinois. 403 pages. This review is reprinted from the Pennsylvania Law Review (March) by permission.

against the background of Mrs. Rutherford's chronicle of the years of leadership by volunteers.

Although she is a lawyer in active practice, Mrs. Rutherford says that she "holds no brief for lawyers, individually or as organized in Bar Associations. The purpose of this study is to gather facts," etc. Whatever predilections and hopes she may have for her chosen profession, she manifestly laid them aside, in favor of a scientific approach and open-minded analysis of the data which she brought together for the first time. By practically all reviewers and commentators, including some who have never shown bias in favor of the Association, her claim to have presented us with "a scientific piece of work written with no preconceived ideas or prejudices" is accepted and conceded. Her starting-point was that "There is need of factual data regarding the policies and activities of the American Bar Association, because the profession of law represents a public profession and occupies a strategic position in the government and the society politic." Others have written biographies of leaders of the Bar and polemics upon particular issues; this volume records the work done and the results attained by Committees and by Sections whose members were numerous and are unnamed—lawyers who already are practically forgotten, even in their home communities, but who in their time worked hard from a sense of public spirit and contributed much to the useful service of the Association to the public and the profession.

Mrs. Rutherford's critical examination of the record as to what the American Bar Association has done and failed to do since 1878 gains present significance because she projects it against a background of the state of the World today. She begins by noting that "the capacity of democratic government to maintain and defend itself is being questioned" in many countries. As one of the causes, she postulates "the failure to organize services of voluntary groups, especially those expert in government and law." If this failure can be overcome and if independent, volunteer agencies can implement public opinion with trained and disinterested judgment comparable with that mobilized by governmental staffs, the author believes that thereby will be created agencies which may help counterbalance the trends toward arbitrary, personal power and popular dependence on government.

Casting about for support of her thesis that "the voluntary services of unbiased experts in government should be evaluated and used," Mrs. Rutherford saw that "The American Bar Association may constitute one of these voluntary groups." She says that "this study represents an effort to obtain facts in relation to what contribution, if any, the American Bar Association has made and is making in the field of government and administration." Her philosophy of what can be done by such an institution is expressed in apt quotation from Mr. Harold J. Laski's *Politics*, that "Effective public opinion for the purpose of government, in a word, is almost always opinion which is organized and differentiated from that of the multitude by the possession of special knowledge." Although she recognizes that, as has been many times demonstrated, such a group as the American Bar Association could not, if it would, dictate or control public opinion or determine the votes or views of even its own members, she finds that "lawyers, because of their training and acquirement of specialized knowledge" and because of the Nation-wide character of the profession and its highly diversified membership, may well be in a position to assist and implement public opinion in matters pertaining to the administration of justice, the competent functioning of democratic government, and the enforcement of rules of law as obstacles to collectivist interference with individual rights which are fundamental in a free society. She trenchantly says:

> "Though governmental problems are difficult of solution, yet quacks and charlatans are not lacking with their ready remedies. Little is accomplished by ballyhoo. There are no panaceas, especially for governmental and legal problems; only knowledge and organization can offer workable solutions."
>
> "There is need of perfecting the democratic process, especially in the fields of law making, law enforcement, and interpretation. . . Can the organized Bar be of any assistance in obtaining efficiency in the functioning of democratic governments?"

This reviewer has outlined and quoted at length Mrs. Rutherford's statement of her basic point of view and purpose, as well as the tests of usefulness which she applied to the institution under scrutiny; they are in a sense as significant and timely as are her accumulation and analysis of data. Does an independent, self-governing institution comprised of 31,000 trained lawyers scattered through all of the States, give any actual aid to democratic government, and constitute any dependable bulwark against opinion subsidized and supported by the purse-strings of centralized government? Has the great bulk of the work of legislation and regulation, and of the administration of justice, been in any respects better done, because of the availability of the expert aids marshalled under the auspices of the American Bar Association? Are there substantial grounds for hoping and believing that, in times when great issues as to the continuance of free institutions are at stake, the organized lawyers of the country can help to crystallize and lead an aroused public opinion in defense of the fundamentals of democratic government? These are questions to which by no means all of the partisans of the profession of the law have been prepared to return affirmative answers with much confidence. The need for answering such questions emphatically in the affirmative may have been among the impelling reasons for the adoption of the present democratic structure of organization of the Bar. Yet Mrs. Rutherford surveyed, from the point of view already quoted, nearly sixty years of the Association's history under its old organization and leadership, and she found that its services to the public and to the profession have been so numerous and so substantial that the Association has on the whole met the tests which she laid down for her evaluation. In consequence, Mrs. Rutherford ranks the American Bar Association of 1878 to 1936 as one of the representative, independent and highly useful public institutions whose activities may be a bulwark against extensions of arbitrary power and against casual, untrained experimentation in the processes of administering justice and conducting government. Never before had the full record been dug out and pieced together; undoubtedly many members of the Association, as well as most of its critics, have been surprised to see how impressive and convincing a story it makes. The author adhered resolutely to the record, and not only made competent and exhaustive research among published and unpublished documents to which she is able to refer categorically in foot-notes, but has also consulted extensively the recollection of many persons identified with the events which she records. She gives facts, and is chary about opinions. All in all, she rendered a real service to the public as

well as to the profession of law; she made a most readable dissertation on a factual subject which might have been made deadly dull. It is of minor importance that there are noteworthy omissions from her summary of the services performed by the Association, and that she confined herself steadfastly to facts for which she could cite record references, even at the cost of failing to catch altogether the spirit and the purposes which have animated the many activities and have seemed to many persons to be the ultimate test of their worth. Her study has the demerits as well as the merits of being resolutely factual; it does not attempt to evaluate the intangibles or the imponderables.

Within the space which this review can reasonably occupy, it is impossible to reproduce here the items of her evaluation or the impressive array of facts with which it is supported. Of outstanding significance is her revelation that a relatively small part of the work of the Association is in controverted or contested fields, except as minor special interests or parochial views may interject themselves as opposing elements. Preponderantly, the activities of the Association relate to matters in which the expert assistance and counsel of Association Committees and groups are cordially welcomed and availed of and are substantially unopposed. The inference seems warranted that the author is of the opinion that the Association has been of the greatest usefulness and influence when it has given active aid to improvement of the administration of justice and to trained draftsmanship in the processes of legislation. Nevertheless, the record indicates that the Association has rarely hesitated to speak and act boldly on controversial issues, if the independence of the administration of justice, the good repute of the profession, or the fundamentals of free government according to law, appeared to be at stake. The volume is noteworthy, not only for its thoroughness in research and skill in the presentation of material, but also for the timeliness of its appearance, just as the Association appears to be moving ahead to realize a broadened concept of its functions and its usefulness. There is sanity and force in Mrs. Rutherford's admonition: "One of the most effective means of creating a favorable public opinion is through the performance of a necessary public service. 'If thou doest well, shalt thou not be accepted?' Genesis 4:7." The author's demonstrated conclusion is that the Association has long performed "a necessary public service," and her dissertation has been accepted by a distinguished faculty of political science, after defense of thesis.

Not a few persons who have held a high opinion, now confirmed, as to the usefulness of the American Bar Association as heretofore organized and led, will lay this volume down with some misgivings. If so much has been done so well, what considerations could have warranted thorough-going change in its structure and processes? Can the country be assured that under a democratized control by elected representatives of the States and localities, the practical results will be as good as, or better than, those attained under the guidance of a volunteer, selective group, who were disinterested, public-spirited, and animated by a sense of obligation to their profession and their country? To questions such as these, Mrs. Rutherford's volume of course gives no answer. She wrote only of achievements under a form of organization and a concept of control considerably different from that obtaining today; she had no opportunity to survey and evaluate the extensive use of referenda, in 1937, as the means of deciding the attitude and action of the Association upon major questions of policy such as the proposed re-making of the Supreme Court of the United States; likewise no opportunity to narrate and appraise the functioning of the new House of Delegates and the substantial results achieved by it during the first year ended at Kansas City about October first. In the final analysis, the answer to any misgivings about the wisdom of the considerable change at a critical time will rest with the changed and changing leadership of the Association; their course of action will determine whether democracy in the government of a National organization of the Bar means a scattering and dissipation of energies; whether will-o'-the-wisps will be pursued and energies expanded beyond resources and beyond the capabilities of the volunteer efforts of lawyers otherwise busy with the work of their profession; and whether the substantial achievements of the past sixty years can be surpassed or matched, under a more democratic government of the Association and a more frequent consultation of the views of the rank and file of its members.

From a long-run point of view, this reviewer thinks that it must be recognized that the distinguished service record of the Association since 1878 has been and is the foundation on which the present broader and more representative structure has been logically brought into being. There were few local Bar Associations, and fewer State Associations, when the American Bar Association was organized. There was then no thought of the integrated, inclusive Bar organizations which now are in effect in sixteen States and embrace all of their lawyers. About 100,000 lawyers now are members of State Bar organizations. With nearly 30,000 members, the American Bar Association had definitely outgrown its own form of organization and operation; plainly it could not act or speak in the name of the organized profession of law, unless it gave a voice and vote to the State Bar Associations and the larger local Bar Associations, constituting much more than a majority of the practising lawyers of the whole country. No matter how wise, patriotic and disinterested was the control of the American Bar Association during the years in which it attained stature as an important and useful institution in the domain of law and justice and government, the time indubitably came when a more representative and authoritative voice of the Bar was needed in many public affairs. The present structure, federating the State Associations, the larger local Associations, and various affiliated organizations of high standing, into a House of Delegates of the legal profession, was a logical and inescapable step forward—in the judgment of many persons, it was taken none too soon. Mrs. Rutherford's volume should be chart and compass for those who wish to keep the Association within fields of practicable usefulness.

Amendments to Housing Act

(*Continued from page* 303)

population there is ⅓ of that of the United States. Small initial payments (frequently less than 10%) and small monthly payments (resulting from long amortization periods and lower interest rates) certainly were an important factor in this stimulus to business and employment. Eventually these factors will have the same effect in this country. In the meantime, the amendments with respect to large housing projects have resulted in many new commitments for insured loans, and in this field construction should soon show marked improvement.

"JONES ASKED SMITH"

MEMBERS WHO HAVE OBTAINED TEN OR MORE NEW MEMBERS SINCE JULY 1, 1937, AS SHOWN BY ENDORSEMENTS ON THE APPLICATIONS

James E. Brenner, Stanford University, California.
Harrison A. Bronson, Grand Forks, North Dakota.
Howard D. Brown, Detroit, Michigan.
J. Early Craig, Phoenix, Arizona.
Frank F. Eckdall, Emporia, Kansas.
Chester W. Fairlie, Newark, New Jersey.
James D. Fellers, Oklahoma City, Oklahoma.
D. A. Frank, Dallas, Texas.
E. Smythe Gambrell, Atlanta, Georgia
Edward Gluck, New York, New York.
Joseph Harrison, Newark, New Jersey.
F. Herrigel, Jr., Newark, New Jersey.
Harvey Johnsen, Omaha, Nebraska.
Lynwood Lord, Woodbury, New Jersey.
Margaret McGurnaghan, Topeka, Kansas.
George Maurice Morris, Washington, D. C.
R. G. Patton, Minneapolis, Minnesota.
William L. Ransom, New York, New York.
Charles Ruzicka, Baltimore, Maryland.
William Sabine, Washington, D. C.
Henry M. Sackett, Jr., Lynchburg, Virginia.
Murray Seasongood, Cincinnati, Ohio.
Eustace Seligman, New York, New York.
David A. Simmons, Houston, Texas.
J. Speed Smith, Seattle, Washington.
Frederick H. Stinchfield, Minneapolis, Minnesota.
Guy Tobler, Hackensack, New Jersey.
Arthur T. Vanderbilt, Newark, New Jersey.
Clinton D. Vernon, Washington, D. C.
John H. Voorhees, Sioux Falls, South Dakota.

MEMBERS WHO HAVE OBTAINED FIVE TO TEN NEW MEMBERS SINCE JULY 1, 1937, AS SHOWN BY ENDORSEMENTS ON THE APPLICATIONS

Lewis Benson, Huron, South Dakota.
Joseph F. Berry, Hartford, Connecticut.
Frank Brockus, Kansas City, Missouri.
Henry F. Butler, Washington, D. C.
Robert Carey, Jersey City, New Jersey.
Robert M. Clark, Topeka, Kansas.
George E. Cleary, New York, New York.
John W. Cronin, Boston, Massachusetts.
John S. Davenport, III, Richmond, Virginia.
E. J. Dimock, New York, New York.
Howard S. Dodd, Montclair, New Jersey.
W. W. Evans, Paterson, New Jersey.
Albert Faulconer, Arkansas City, Kansas.
Walter S. Foster, Lansing, Michigan.
T. Austin Gavin, Tulsa, Oklahoma.
John Gerdes, New York, New York.
William T. Gossett, New York, New York.
F. Henri Henriod, Salt Lake City, Utah.
R. A. Kleinschmidt, Tulsa, Oklahoma.
Harry S. Knight, Sunbury, Pennsylvania.
Carl H. Langknecht, Kansas City, Missouri.
William P. Lehman, Fairmont, West Virginia.
Philip H. Lewis, Topeka, Kansas.
H. W. Lindeman, Newark, New Jersey.
Alva M. Lumpkin, Columbia, South Carolina.
Murl M. Maupin, Ogallala, Nebraska.
B. Allston Moore, Charleston, South Carolina.
Eugene V. Myers, New York, New York.
David W. Peck, New York, New York.
Ralph R. Quillian, Atlanta, Georgia.
John J. Sirica, Washington, D. C.
Elmer A. Smith, Chicago, Illinois.
Hugh C. Smith, Washington, D. C.
Reginald H. Smith, Boston, Massachusetts.
W. E. Stanley, Wichita, Kansas.
Sidney Teiser, Portland, Oregon.
Charles W. Tooke, New York, New York.
W. H. Vernon, Larned, Kansas.
William W. Yerrall, Springfield, Massachusetts

Power of Courts to Set Aside Administrative Rules and Orders

(*Continued from page* 281)

by the courts of the state enacting the law, the Supreme Court will not interfere even though the statute makes the findings conclusive. I assume jurisdictional matters will always be open for review by the courts as in certiorari cases. We may conclude therefore that *Crowell* v. *Benson* will not materially affect administrative procedure under state laws except in rate-making cases.

It may not be inappropriate to refer very briefly to a matter not within the agenda. It is my firm conviction that sooner or later provision will be made for a more liberal review of the findings of administrative agencies. In a number of jurisdictions there are now under consideration proposals to create an appellate administrative agency. As was stated in *Crowell* v. *Benson*, already referred to here today, the power conclusively to find the facts is in many cases the power to determine the controversy with finality. Experience in reviewing the records of administrative agencies suggests that in some, not in many cases, findings of fact are made to produce a desired result in a particular case; that while there is some slight evidence to support the findings the great weight and clear preponderance of the evidence is the other way. Administrative agencies would be much less liable to make such findings if they knew their determinations were to be reviewed. Litigants upon whom liability is imposed in such cases feel, and rightly so, an injustice is done them. Among English-speaking peoples the right of appeal is almost as sacred as the right to a trial. Deprived of this right of appeal or effective review litigants denounce the whole system of administrative law and it is conceivable at least that in time strong antagonism might be aroused against it. In my opinion the review should be by an administrative agency rather than by a court because the administrative agency has greater freedom and flexibility of action. It could more easily and profitably call to its assistance experts in the particular matter under consideration. It would not be bound by the formalities which bind the courts in considering appeals, the procedure might be made more expeditious and of a more summary character and there are many other reasons which will suggest themselves to anyone familiar with the practical workings of administrative agencies. (Applause)

LEGAL ETHICS AND PROFESSIONAL DISCIPLINE

Lawyers Participating in Radio Broadcasts May Violate Canon 47

AT its last meeting, the American Bar Association adopted a new Canon, which forbids lawyers to aid the unauthorized practice of law, as follows: "No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate." Canon 47.

In Rosenthal et al. v. Shepard Broadcasting Service, Inc., 12 N. E. (2d) 819, decided by the Supreme Judicial Court of Massachusetts, on February 2, 1938, it was held that the defendant, in its radio broadcast, known as the "Court of Common Troubles" and "Goodwill Court," had violated a statute which forbids a corporation to "give legal advice in matters not relating to its lawful business, or practice law." Since the adoption of the Canon above quoted, it is clear that it is improper for a lawyer to participate in any kind of a program that constitutes illegal practice of the law.

The facts were stated by the Court as follows:

"The respondent maintained and operated a broadcasting station in Boston as a commercial enterprise for its own profit. The respondent sold the use of its broadcasting facilities to individuals or corporations for fixed periods of time during which such persons or corporations, under agreement with the respondent, produced programs for broadcasting. Such purchaser was called a sponsor. There were other programs, called sustaining programs, which were produced and paid for by the respondent. The programs of the court of common troubles originated in the studio of the respondent in Boston. The good-will court program originated in New York was transmitted over a telegraph wire from New York to the respondent's studio in Boston, and was relayed by the respondent through its Boston station. The same program was also 'broadcast over sixty-six different channels' in thirty-nine different States. This program was sponsored by a corporation interested in the sale of a particular brand of coffee and was interspersed with remarks advertising that coffee.

"The program of the court of common troubles was conducted in this fashion: The announcer stated that the opinions to be expressed on the cases presented were to be based on the law of Massachusetts and that there was no intention to offer legal advice as a substitute for that given by attorneys. The names of two judges in the district or municipal courts of this Commonwealth were then given and a member of the bar was introduced as conductor. It was announced that anyone was invited to state his problems and that the purpose was to furnish enlightenment as to the law of Massachusetts. The conductor then asked some person to present his problem. That was done and the conductor clarified the matter by further questions if thought desirable. Then the advisory answer was given by one of the judges. The general practice pursued in determining the persons to appear before the microphone was for the conductor, prior to the broadcast, to meet various individuals who had written their problems and sent them either to the respondent or to the conductor. The conductor exercised his judgment in the selection of the particular person whose problems were to be presented. Opportunity was thus offered for consideration beforehand of the problem both by the conductor and by the judge who expressed an opinion at the time of the broadcast. The master's report sets forth numerous instances where advice was given covering rules touching proper registration of an automobile, remedies for nonpayment of rent by a tenant, the right of an administratrix to recover possession and control of personal property belonging to the estate, the claim of a tenant for fixtures installed by him, the right of a young woman to an engagement ring after termination of the engagement and rules touching divorce. Most of the cases stated involved questions of civil rights and liabilities and were of a nature usually dealt with by practicing attorneys in the course of giving advice to clients in office consultation and by judges of trial courts in the consideration of cases before them while on the bench.

"The programs of the goodwill court were produced in New York and transmitted to the defendant's studio in Boston. The defendant received a money consideration for the use of its facilities in broadcasting these programs. The methods pursued in the presentation of the goodwill court program were similar to those already described as to the presentation of the court of common troubles, except that the conductor, so far as known, was not a member of the bar. The two judges who acted at each broadcast at some times were presiding judges in various courts in the State of New York and at other times were either retired judges of the State of New York or presiding or retired judges of the State of New Jersey. There are recited in the master's report various instances of the giving of advice over the broadcasting facilities of the respondent touching the legal problems arising in the usual experiences of life. The announcer at the outset of the program stated that the opinions to be expressed were based upon and in accordance with the law of New York and not in accordance with that of any other jurisdiction; that the law was different in different jurisdictions; and that there was no design in giving legal advice to supplant lawyers.

"The goodwill court has been discontinued since December 20, 1936, when public statement to that effect was made. No program of the court of common troubles has been presented since December 19, 1936, although no public statement has been made concerning it. The time theretofor allotted to these by the respondent has been devoted to programs of a different character."

Holding that these programs constituted the practice of law, the Court said:

"It is clear that the programs presented by the court of common troubles were within the sweep of the prohibitions of St. 1935, c. 346. The giving of advice as to legal matters has been commonly recognized as an important part of the activities reserved for members of the bar and constitutes the practice of law. The instances of giving such advice by the respondent stated in the master's report form the practice of law. . . The giving of legal advice in the manner described in the master's report not only violates the confidential relation of an attorney and client but is inconsistent with the traditional standards of the bar and the courts.

"The argument that these programs were designed as gratuitous service to indigent persons is without foundation. There is no finding that the persons seeking and receiving such advice were indigent. There is an express finding that the respondent was conducting these programs as a part of its commercial adventure for profit. There is no finding that the motives of the respondent were charitable. The form which the activities of the respondent take is illegal and contrary to the statute and against the policy of the Commonwealth as there declared."

Since the programs had been discontinued, the Court decided that the injunction prayed for should not issue, but it taxed the costs against the defendant because the proceeding was brought under statutory authorization for the public welfare and not for selfish reasons or for pecuniary profit.

Fees Again

In his opinion in In re The Baldwin Locomotive Works, Debtor, U. S. District Judge Oliver B. Dickin-

son criticized the fees requested by the counsel of various security-holder creditors in reorganization proceedings under section 77B of the National Bankruptcy Act. Counsel had asked approximately $1,000,000. Judge Dickinson, allowing only $55,875.39, said:

"The benefits of section 77B are limited to corporations and further to those which are in need of indulgent treatment from their creditors to save them from the financial rocks of business disaster. Section 77B holds out a helping hand, but if it is extended only at a prohibitive cost it might as well be withheld. It has often been remarked that a grave defect in our system of administering legal justice, is the inordinate expense attending it. Take the case before us as an illustration. What the debtor needed, asked for, and has thus far secured, is a reduction in its mortgage debt obligations. The terms of this reduction are such as to affect the interests of stockholders, preferred and common. Its other creditors are not affected. The only help of which the debtor was in need could have been afforded through a composition agreement. The number of its bondholder creditors was so large and the personnel so fleeting, that an agreement with all of them was impracticable. The problem presented was the simple one of securing, by this proceeding, the agreement of the required percentage of the creditors affected and to have the court agree for those who could not be reached, and for the dissenting minority. Had the interests affected not been so large, this would have been an easy task. It is its size which gives it complexity. This debtor, as most of the commercial, industrial and financial organizations of today, is afflicted with the vice of bigness. It is always well before entering upon any venture to count the cost. The prophecy is a safe one that the cost of these section 77B proceedings is so great as to swamp the debtor which nominally secures a relief from them.

"Subsection 9 of section C of the act provides that the court may allow reasonable compensation to all interested parties to cover their expenses, including counsel fees, attendant upon the proceeding. The motive for including this provision in the act is obvious. The debtor proposes to reduce the claim of the creditor. Upon this the creditor should be heard. He is, as a consequence, dragged into what may turn out to be a protracted and costly litigation, the expense of which should not be imposed upon him. Congress has dealt with this general situation, which in itself presents no difficulties; but when we come to consider the allowances which should be made, the situation of the creditors and their counsel becomes so various as to make the discussion of them interminable. The debtor is in a class by itself. It is paying its own debt and may be left to fix it by agreement. Assuming that the allowance to counsel for the debtor asked for is agreed to by the debtor, we grant it formal leave to pay to its counsel this sum. When, however, the allowances asked are to be paid not by the person to whom the services were rendered, but by someone else, a different situation is presented. The services rendered by counsel for creditors may be regarded by the debtor as in no sense helpful, but on the contrary to have been obstructive, resulting in making the proceeding protracted and costly. Many other differences in the situation of those asking for allowances are bound to exist. These present difficulties, but back of all is the one that we have no standard by which to value the services rendered, unless it be the sum which the one for whom the services were rendered would have himself voluntarily paid. After all, any judgment exercised in fixing these allowances is more or less an arbitrary ipse dixit one.

"The question we have before us is not that of reasonable counsel fees to counsel representing clients but the contribution which the debtor should make to the expenses incurred by creditors, including counsel fees. There is a limit to this in the aggregate. All the creditor is called upon to do is to voice his acceptance or rejection of a plan of debt readjustment. To enable him to do this intelligently he must have full information of the plan and how it will affect him. The expense of procuring this may properly be imposed upon the debtor. If at the time of filing a petition under section 77B the debtor was required to appropriate a sum to cover this expense, at what would it be estimated? In a case such as this the sum of $50,000 would be thought to be ample. The allowances we have made aggregate nearly $56,000. We think the debtor should not be required to contribute more."

"Due Process" in Disbarment Proceedings

In Massachusetts, an attorney recently pleaded guilty in the Superior Court to two indictments charging larceny of $11,400. Thereafter, the Court, upon its own motion, issued an order requiring respondent to appear before the court for the transaction of criminal business on a stated day and show cause why he should not be disbarred. The respondent appeared and an order of disbarment was entered. The judge who heard the disbarment proceeding had received the pleas of guilty upon the indictment. The respondent's bill of execptions recited that the court "by virtue of its inherent power to control the conduct of its affairs, has a summary jurisdiction to inquire into the conduct of its officers, and to deal with an attorney found to have committed any evil practice contrary to justice and honesty," but he excepted to the order of disbarment, "since there was no hearing held by the Court to determine by evidence whether or not the respondent had committeed any or all of the alleged crimes in the said criminal cases, and since the disbarment proceeding against the respondent has been so conducted that he has been deprived of due process of law."

Dismissing respondent's exceptions, the Court said:

"The respondent, for the first time, raises in this court the question of jurisdiction. It is open to him. Matter of Mayberry, Mass., 3 N.E.2d 248, 105 A.L.R. 976. His precise point is that the Superior Court, in a session held for the transaction of criminal business, had no jurisdiction to hear the matter. The Superior Court is a court of original and general jurisdiction and possesses the inherent powers of such a court under the common law, unless expressly limited, as well as those conferred by statute. Commonwealth v. Kemp, 254 Mass. 190, 150 N.E. 172; G.L. (Ter. Ed.) c. 212. While it is true that a proceeding such as this is civil and not criminal in character, Matter of Mayberry, supra, yet this characteristic has generally been confined to questions of evidence, the required amount of proof and other matters of procedure. Matter of Keenan, 287 Mass. 577, 192 N.E. 65, 96 A.L.R. 679; Matter of Ulmer, 268 Mass. 373, 167 N.E. 749. In the case of Randall, Petitioner, 11 Allen 473, the proceedings for disbarment, which were complained of but were upheld, were had in the Superior Court held for the transaction of criminal business, although no jurisdictional question was raised. As was said in Bar Association of Boston v. Casey, 211 Mass. 187, at page 192, N.E. 751, 754, 39 L.R.A., N.S., 116, Ann. Cas. 1913A, 1226, 'A proceeding for disbarment is simply the exercise of jurisdiction over an officer, an inquiry into his conduct not for the purpose of granting redress to a client or other person for wrong done, but only for the maintenance of the purity and dignity of the court by removing an unfit officer. As stated . . . in Fairfield County Bar v. Taylor, 60 Conn. 11, 15, 22 A. 441, 13 L.R.A. 767: "(The proceedings are) an investigation by the court into the conduct of one of its own officers, not the trial of an action or suit."' We think the Superior Court properly exercised its jurisdiction.

"The respondent further alleges that inasmuch as no petition under G.L. (Ter. Ed.) cc. 221, § 40, was filed for his removal, the Superior Court was without jurisdiction to hear and determine the matter. The decision in Randall, Petitioner, supra, is decisive on this point and against the

respondent's contention. See Opinion of the Justices, 279 Mass. 607, at page 610, 180 N.E. 725, 727, 81 A.L.R. 1059, where the justices say, "The inherent jurisdiction of the judicial department of government over attorneys at law is illustrated in several of our decisions to the effect that power to remove an attorney for misconduct, malpractice, or deficiency in character, although recognized by statute (G.L. c. 221, § 40, as amended by St. 1924, c. 134), is nevertheless inherent and exists without a statute. . . .

"Finally the respondent alleges that he was not given a hearing on the charges. His right to a hearing is unquestioned. Matter of Sleeper, 251 Mass. 6, 146 N.E. 269. His bill of exceptions sets out, 'The respondent alleges that . . . the said Court, after a hearing. . .' The order of court recites '. . . and whereas . . . said Stern appeared before said Court with counsel in response to said notice, the said Court after a hearing took the matter under advisement, and . . . ordered that said Stern be disbarred. . .' At the disbarment proceedings, his counsel admitted that the respondent pleaded guilty 'as stated.' On May 24, 1937, a judge of the Superior Court had heard the respondent plead guilty to the larceny indictments, and, on June 9 following, that same judge was called upon to hear whether, because of those pleas, the respondent should be disbarred. The record shows that the respondent had a hearing."—In re Stern, 12 N.E. (2d) 10 D.

Illinois Bar Association to Classify its Members

At its meeting on February 12, 1938, the Board of Governors of the Illinois State Bar Association directed the Secretary of the Association "to publish, in 1938, a volume showing the names of the members of the Illinois State Bar Association according to cities, the name of each with his address and telephone number; in addition, for each member who cares to furnish the information, his legal education, whether he is in general practice, and not more than five special fields of law in which he has had three successful experiences. If he is not in active practice this may also be indicated. In cities having a bar of over one hundred members an additional classified list of general practitioners be included showing the different fields of practice together with the list of members experienced in each field.

"An advisory committee to consist of the three Vice Presidents is hereby appointed to consult from time to time with the Secretary with power to change the style, or plan of publication as they may deem advisable." COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES,
By H. W. ARANT, SEC'Y.

JUNIOR BAR NOTES

By PAUL F. HANNAH
Secretary of Junior Bar Conference

WITH approximately 140 local directors actively at work in twenty-three states, the Conference's Public Information and American Citizenship programs are passing out of the organization stage into the field of actual accomplishment. Ralph Quillian, Chairman of the American Bar Association's American Citizenship Committee, reports that talks on citizenship are being given in all the larger metropolitan areas of the country, and that regional meetings held in Newark, Columbus, Detroit, Dallas, San Francisco, and Denver have given great impetus to the work of his Committee. It is estimated that more than one thousand volunteer Conference speakers are now participating in the programs.

Information directors who have been appointed since the last report include: In Louisiana: Brainerd S. Montgomery for New Orleans. In Maine: George F. Peabody for Bangor; Fred C. Scribner, Jr., for Portland. In New Jersey: Ambrose Mudrak for Carteret; Anthony V. Ceres for Perth Amboy; James Deshler II, for New Brunswick; Robert Meyner for Phillipsburg; John Mulane for South Amboy; Francis N. Reps for South River. In Ohio: H. Bartley Arnold, Jr. for Columbus; Joseph Frease for Canton; Rowan A. Greer, Jr. for Dayton; Robert O. Hilty for Toledo; Harley J. McNeal for Cleveland; Kenneth C. Schafer for Youngstown; Jerome Taylor for Akron. In Wisconsin: Charles H. Cashin for Portage; Vaughn Conway for Baraboo; Jacob A. Fessler for Sheboygan; Walter Hammond for Kenosha; Paul A. Hemmy, Jr. for Juneau; Lavern G. Kostner for Arcadia; Miles Lambert for Wausau; Edwin Larkin for Mondovi; Arthur J. Moran for Delavan; A. M. O'Melia for Rhinelander; Phillip Owens for Portage; Don Perry for Black River Falls; Bailey Ramsdell for Eau Claire; W. Mead Stillman for Oshkosh; and Allen C. Wittkopf for Florence.

Many state chairmen have failed in their responsibility to appoint local directors. Such chairmen are not only threatening the success of the Conference work, but are depriving the Conference members in their states of real opportunities to engage in public-spirited endeavors. They should not fail to notify Milford Springer, Federal Communications Commission, Washington, D. C., of their appointments prior to April 20.

* *

The Board of Governors of the American Bar Association has requested Chairman Weston Vernon, Jr. to make a preliminary report on this year's Conference activities on May 9th. In order that his report may fully reflect all the accomplishments to date, the Chairman has in turn asked each state and committee chairman and local director to give him the details of their activities on or before April 20th. It is the hope of the officers of the Conference that each person will promptly comply with the request, and, even if somewhat inactive hitherto, will, before April 20, accomplish enough to make a creditable report.

* *

That the regional meeting in Dallas on February 21 (reported from the advance program in the *March* issue) set a new high in interest, oratory and accomplishment seems to be the view of those in attendance. Of particular interest were the addresses at the dinner of Hon. Alexander Holtzoff, special assistant to the Attorney General, on "The Ebb and Flow of Constitutional Change," and of Judge Nelson Phillips, former Chief Justice of the Supreme Court of Texas. In the morning session, La Vergne Guinn made an eloquent plea on behalf of the Public Information Program, for lawyers to keep the public informed on legal matters of

public interest. Pointing out that "lawyers draft laws, pass laws, litigate laws, and judge laws," he said it was the profession's unmistakable duty to place suggested laws, rules and regulations "under the microscope, and impartially advise the public as to our findings, before and not after such suggestions have been hastily okayed by some Congress or legislature."

Weston Vernon, Jr., whose modesty or multiple duties prevented him from obeying your Secretary's edict to write out his speech, was a principal contributor to the success of the meeting and in return received a Texas six shooter, which he promises to use on delinquent state chairmen.

Allen Melton, La Vergne Guinn, James Walsh, Bob Burgess, Fred Martin, Gerald C. Mann and others are entitled to all praise for the program they arranged and put over.

* *

George Washington's birthday marked the date of a very effective meeting of the Little Rock, Arkansas Junior Bar, which was attended by many of those at the Dallas meeting the day before. Among the speakers were: Chairman Vernon, six shooter and all; Assistant to the Attorney General Holtzoff; Frank Eckdall, 10th Circuit Council member; La Vernge Guinn of Texas; Lon Hocker, Jr., Missouri State Chairman; Bob Pharr, Chairman of the Tennessee Junior Bar Association; Auvergne Blaylock, President of the Memphis Junior Bar Association; and Howard Pritchard, Tennessee State Chairman. The problems, functions and achievements of the Junior Bar were thoroughly discussed. The meeting, besides being enjoyable, promises to be a spur to even greater activity in Arkansas.

Little Rock has one of the most active Junior Bars in the country and is the home of one of the most active State Chairmen, Howard Cockrill. The membership activities of Cooper Jacoway have brought the Conference membership up to forty-nine. Under the leadership of Gerland Patten, a number of talks have been made before civic clubs and forums. The Junior Bar drive, headed by Terrell Marshall, against the unauthorized practice of the law has been highly successful. Another achievement has been the establishment of a legal aid clinic, the credit for which, according to State Chairman Cockrill, goes to George Rose Smith.

* *

Under the leadership of State Chairman Joseph D. Calhoun, Conference activities in Pennsylvania are taking a new lease on life. He has endeavored to coordinate the work of the Junior Bar groups of both the State and national bar organizations, and has proposed a "reciprocity" arrangement by which it is hoped to establish a joint membership. The executive council of the Junior Bar Section of the Pennsylvania State Bar Association has pledged cooperation of its members with the Conference. A special group, headed by Zachary T. Wobensmith II, has been appointed to lead activities in Philadelphia.

* *

W. H. McSwain, State Chairman of Illinois, reports that the public information program is operating under a full head of steam in the Chicago area. More than 150 volunteer speakers have been enrolled with State Director Willett Gorham, and more than 300 civic groups, labor and fraternal organizations have been circulated. The response has been most favorable, and Illinois advises other states to look to their laurels if they hope to make a better record.

* *

The Junior Bar Section of the Ohio State Bar Association, one of the first junior sections organized in the country, has recently amended its by-laws to comply with Conference requirements, and applied for affiliation with the Conference. At its midwinter meeting, the Section adopted as its major project for the year 1938 cooperation with the American Citizenship campaign of the American Bar Association. This unit, with a long record of achievement behind it, will be a welcome addition to the ranks of affiliate organizations joining with the Conference.

* *

Plans for a concentrated membership drive to be conducted throughout Michigan about April 15th were formulated at the first meeting of the leaders of the Junior Bar Conference in Michigan, held on March 5. The group also voted to adopt the Los Angeles plan of organization for a public information program which was to be immediately launched. At the request of President George Brand, of the Michigan Bar Association, who was present at the meeting, cooperation with the Association's efforts to secure a constitutional amendment for the appointment of judges was agreed upon.

Atttending the meeting were Carl V. Essery, Chairman of the Section on Bar Organization Activities; Earl Morris, Council member, Sixth Circuit; LeRoy W. Dahlberg, Michigan State Chairman; Donald Hyde, Michigan Member, American Citizenship Advisory Committee; Stanley Fulton, State Membership Chairman; Esther Tuttle, Historian; Max Veech and Howard Simon, representing the Detroit Junior Bar group, and Gordon Tappan and Frank Cooper, local directors for Port Huron and Detroit. A dinner followed the business meeting.

Arrangements for Annual Meeting, Cleveland, Ohio

July 25-29, 1938

HEADQUARTERS—HOTEL CLEVELAND

Hotel accommodations, all with bath, are available as follows:

	Single for 1 person	Double (dbl. bed) for 2 persons	Twin beds for 2 persons	Parlor Suites
CLEVELAND	$2.75 & $3.00	$4.50 (See note below)		
ALLERTON	2.25 to 3.50	3.75 to 5.00	$4.50 to $6.00	$7 & up
AUDITORIUM	3.00 to 3.50	4.50 to 5.00	6.00 to 7.00	
CARTER	3.00 to 5.00	5.00 to 7.00	7.00 to 10.00	12 & up
HOLLENDEN	3.50 to 7.00	5.00 to 7.50	6.00 to 12.00	12 & up
STATLER	3.00 to 6.00	4.50 to 8.00	5.00 to 8.00	10 & up

NOTE—Parlor suites and twin bed rooms at the Cleveland Hotel have been exhausted. Members desiring accommodations of that type should select one of the other hotels listed above.

Explanation of Type of Rooms

A single room contains either a single or double bed to be occupied by *one person*. A double room contains a double bed to be occupied by *two persons*.

A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with the parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservations, stating hotel desired, number of rooms required and rate therefor, names of persons who will occupy the same, and arrival date, including definite information as to whether such arrival will be in the morning or evening.

Requests for reservations should be addressed to the Executive Secretary, 1140 N. Dearborn St., Chicago, Illinois.

Current Events

(Continued from page 265)

Removal of T. V. A. Director

Beneath all the news and views now going by on the President's removal of Chairman Arthur E. Morgan of the Tennessee Valley Authority, is the undercurrent of legal thought as to the right of the Executive to take such action. The official view of the legal basis for the removal is contained in the opinion written to the President by Acting Attorney General Robert H. Jackson. The opinion referred to one member of the board being "charged with openly defying your constitutional authority to take care that the laws be faithfully executed by refusing to answer your reasonable inquiries concerning the situation in the Authority."

It then was stated as "an unassailable proposition that if any of these charges is established, the power of removal ought to exist"; and the argument was continued to the effect that "the Tennessee Valley Authority being an executive agency, performing executive functions, and therefore in the executive branch of the Government, the power of removal ought to be in the President." The more specific legal points which the opinion proceeded to make were these:

1. "Under the principles announced by the Supreme Court in Myers vs. United States, 272 U. S. 52, there would appear to be no question that the power of removal is in fact vested in the President." Therein "the court upheld the President's power to remove a postmaster notwithstanding a statutory provision that he should hold office for four years and should be removable by the President only with the consent of the Senate."

2. In the case of a member of the Federal Trade Commission, Humphrey's Executor vs. United States, 295 U. S. 602, the court "limited the application of the Myers case but did not disturb the ruling therein as applied to executive officers . . . but relied upon the distinguishable fact that the Federal Trade Commission exercises quasi-legislative and quasi-judicial functions and is not a part of the executive branch."

3. Another distinguishing factor, not present in respect to the Tennessee Valley Authority, was indicated where, in the Humphrey opinion, the court "laid great stress upon the legislative history of the Federal Trade Commission Act as indicating a purpose of the Congress to secure the maximum independence of the commission from executive interference and control."

4. The Acting Attorney General's opinion cited, as the only statutory provisions bearing on the question, Sec. 4 (f) of the Tennessee Valley Authority Act (48 Stat. 58, 60, 63) which provides in part "that any member of said board may be removed from office at any time by a concurrent resolution of the Senate and the House of Representatives"; and Sec. 6, which prohibits giving consideration to political tests or qualifications in selection or promotion of employes of the corporation, and continues: "Any member of said board who is found by the President of the United States to be guilty of a violation of this section shall be removed from office by the President of the United States." It then was argued that the provision in section 4 (f) for removal of members of the board by action of the Senate and House "does not, and could not have been intended to, provide an exclusive means of removal"; and that "this is demonstrated by the provisions in section 6 that under certain conditions the President shall remove." It was suggested that section 4 (f) may only have been "intended to provide a method of removal by the legislative branch in addition to the more cumbersome method of removal by impeachment."

5. "The provision in section 6 that the President shall remove members of the Tennessee Valley Authority Board for violation of the inhibition against appointments and promotions for political reasons cannot be construed as an intendment with statutory force that he shall not remove them for other causes"; and

6. "To authorize the President to remove a director for mere consideration of a political indorsement in appointing a minor employe and yet to deny him the power to remove a director for more substantial causes (perhaps amounting to malfeasance in the highest degree) would be an absurdity —and the rules of construction do not permit an interpretation which would attribute to the Congress the intendment of an absurd result."

The conclusion was: "It is my opinion that you have the power to remove members of the Tennessee Valley Authority from office."

Those holding the view that the President does not have legal authority to remove Chairman Morgan on the grounds which he stated feel stunned by the effort to comprehend the outside limits of the President's authority over all officials and branches of the Government if the constitutional admonition that "he shall take care that the laws be faithfully executed," Art. 2, Sec. 3, is to be construed to give him authority to remove officers where the statute specifically reposes that authority in the two houses of Congress. They see no weight, in support of the President's action, in the suggestion that the power of removal ought to exist when the statute already has established that power and has definitely placed it in Congress. Nor do they grant that this power ought to be in the President merely because the T. V. A. may, in many respects perform executive functions—especially since the President himself signed the act placing this power in Congress. Their argument continues:

1. In the Myers case the court followed the statute, which they may be expected to do in this Morgan case if it comes before them and thus hold that the power to remove a director of the Tennessee Valley Authority rests only in Congress. In the Myers case the President started by following the statute, and in fact followed it to the extent that it pertained to him; whereas in this Morgan case the President started his removal activities without any statutory guidance and in fact followed an admonition clearly intended solely for another coordinate agency of the Government.

2. The Humphrey situation was substantially different from the Morgan case since in that case there was no statutory provision placing the power of removal squarely in Congress.

3. Where there is a statutory provision there is no need to go into the legislative history of the agency involved in the same way as was done in the Humphrey case in respect to the Federal Trade Commission Act where it was desirable to show the exact nature of the agency in the process of applying the general principle of our law as to the division of powers among the three coordinate branches of the Government. There is no object in considering whether the Tennessee Valley Authority has quasi-legislative or quasi-judicial functions because, in view of the statute, this is not that kind

of a case. If the question of division of powers is to arise in the Morgan case, it must come up in another way, viz., in determining whether Congress *may* retain the right of removal of an officer whose duties lie within the executive branch of the Government.

4. It is not sound to argue that Sec. 4 (f) does not place the general powers of removal exclusively in Congress; because Sec. 6 is the one which gives a specific power of removal to the President. The two methods taken together cover the field and each must be considered as exclusive within its own zone, i. e., the President may remove a director for imposing political tests on employes and Congress may remove directors for any other causes.

5. To say that section 6 carries no implication that the President may not remove for other causes than the one there described is not a conclusive argument because section 4 (f) is the section that inhibits his powers.

6. There is no absurd result such as the Acting Attorney General visualizes since the powers of removal which the President does not have are definitely given to Congress.

Some of the queries developed by this controversy are: Where do legislative and executive functions properly begin and end? May Congress create agencies for governmental activity but have no right to retain any control over them unless it might be to vote for their abolition, subject, of course, to the presidential veto, if such a measure should later be proposed? Is the matter of removing a principal officer of an agency, which Congress has aided in creating, necessarily and wholly an executive function? And, finally, do we have, or can we have, an exact and complete separation of functions between the legislative and executive branches of our Government?

News of the Bar Associations

New Jersey Bar Association Holds Mid-Winter Meeting

THE regular mid-winter meeting of the New Jersey State Bar Association was held in Newark on February 5, 1938. President William J. Morrison, Jr., of Hackensack presided.

A business meeting was held in the morning beginning at 10:30. Although the meeting transacted mostly routine business, several outstanding developments were noted. From time to time, during this and last year, committees have been appointed to confer with committees of other professional and business societies relative to reaching a better understanding with us. These all reported that there was a possibility of creating a better general feeling between the Bar and other groups and, incidentally, the public as well. The committees making these reports were those appointed to confer with representatives of the New Jersey Accountants' Society, under the direction of Mr. David Klausner of Jersey City; the New Jersey Association of Real Estate Boards, under Mr. Orlando P. Dey of Rahway; and the Society of Professional Engineers, under the chairmanship of Mr. Leo S. Carney of East Newark.

Mr. William R. Gannon of Jersey City reported for the Section of Banking Law, which is giving attention to study of the various problems which have been raised by recent legislation. Mr. Hamilton Cross of Jersey City, re-elected as Chairman of the Section of Commercial Law, reported for that Section, which has approved the stand of the American Bar Association in regard to commercial business as related to law lists and collection agencies.

Mr. L. Stanley Ford of Hackensack, retiring Chairman of the Junior Section, reported that at the annual meeting Mr. Otto E. Adolph of Elizabeth and Mr. Louis A. Mounier, Jr. of Hackensack had been elected Chairman and Secretary, respectively, and that Mr. Julius Sklar of Camden had been re-elected Vice Chairman. The Junior Section on Friday evening had a most interesting dinner and open forum discussion of the topic, "What is the matter with the Law?"

One of the new committees this year was one to Coordinate the activities of the Association. Its purpose is to prevent overlapping and duplication as far as possible. The Chairman of this Committee, Judge William D. Lippincott of Camden, the First Vice President of the Association, presented its report. This showed that a great deal of work had been done, with the interested cooperation of all the sections and committees. One of the recommendations made was that an effort be made to establish a more uniform procedure in the matter of ethics and grievances throughout the State, and that this be done by attempting to secure the cooperation of the county committees. The recommendation was adopted and the State Committee on Ethics and Grievances announced that it would immediately begin efforts to carry it out.

Supreme Court to Hear "Integrated Bar" Petition

President William J. Morrison, Jr. reported with regard to the activities of the Trustees of the Association in carrying out the mandate to attempt to secure an integrated Bar in New Jersey. He stated that a petition had been presented to our Supreme Court and that May 16 had been set as the date for argument on the question. At the close of the report, a resolution expressing appreciation of Mr. Morrison's efforts to see that the issue of integration should be fairly and intelligently presented was unanimously adopted.

A resolution presented by Mr. Frederick P. Schenck, that the Committee on Publicity of the Association become active in procuring the publication of corrected information about lawyers and the practice of law generally, especially where articles giving incorrect information had been printed, and also giving other directions to the said Committee, was passed. The Committee on Publicity is new and its duties have not

yet been duly defined. This Committee was created because it was considered necessary that the Bar use the methods for its protection which are used against it from time to time.

The meeting adjourned for luncheon. The guests of honor at this affair were Associate Justice Frank T. Lloyd of the Supreme Court, who was retiring, Associate Justice Charles W. Parker, Associate Justice Thomas W. Trenchard and Vice Chancellor Vivian M. Lewis, all of whom were being honored for their long and distinguished service as members of the Judiciary of the State. President Morrison presided. The First Vice President, Judge Lippincott, greeted the guests of honor on behalf of the Association. During his remarks he recalled that Justice Trenchard had been one of the founders of the New Jersey State Bar Association and that the other three had become members shortly thereafter and had given long and distinguished service to the Association for over thirty years.

Tributes to Distinguished Judges

"They have recognized, and we fully recognize," Judge Lippincott continued, "the great advantage which is mutually derived from having the members of the court keep in touch with the doings and the actions of our Bar Association and the problems which confront us from time to time, and having them help to solve those problems as they arise. We appreciate very much indeed that during the years of their service on the Bench, they have remained steadfast in their membership in this Association. We owe them a debt of gratitude for their contribution in State Bar Association matters."

In speaking of the service which the guests of honor have rendered as members of the Court, Judge Lippincott said: "All of these gentlemen have merited, by their industry and by their courtesy to all of the counsel, members of the Bar and citizens who come before their court, by their attention to and interest in matters of the court, the esteem and admiration and, above all, the confidence of the members of the Bar of this State and of the people of this State."

To Justice Lloyd, who was retiring from the Bench and returning to active practice, Judge Lippincott, on behalf of the Association, wished a long, happy, and prosperous career and for the others a continuance of their distinguished service as members of the Judiciary. Responses were made by each of the guests of honor, who expressed their appreciation of the efforts of the members of the Bar to be helpful in administering justice in our courts.

Mr. Smith Vouches for "Integrated Bar"

The distinguished speaker of the meeting was Mr. Julius C. Smith of Greensboro, North Carolina, a former President of the Bar Association of that State. Mr. Smith discussed the "Integrated Bar," as one who spoke from experience. He said that in North Carolina the integrated bar was working very well, that the interest of the members of the Bar in the problems of the profession had been much increased, that the devotion of the administrative officers had been singular and had resulted in an avoidance of some of the dire predictions made before the Bar was integrated, that the spirit of the Bar in North Carolina has changed so that its members appreciate the profession and its place in public life more than ever, and that, contrary to expectation, many of those who fought hardest against integration in the first place are now the greatest boosters for it.

From Mr. Smith's address, it was noted that he had, as one who worked for the integrated Bar, heard all of the

arguments against it which are being used in New Jersey today. He took up several of these arguments and answered them from the point of view of one who had the experience of being a part of an integrated Bar. In particular, with regard to the argument that the administration of the Bar might get into the hands of a group who will impress their particular ideals and ideas upon the Bar as a whole, Mr. Smith said: "That is far from the truth. Men of ability and responsibility compose our Council in North Carolina, and it is handled fairly and honestly. I say to you, after having served for two years as President of that organization, that the practitioner of high standing, of high moral character, with the consciousness of the duty of a lawyer as an officer of the court, not only has nothing to fear from the integrated Bar but should be grateful to receive it. The only person who need fear is the lawyer who is untrue to his trust and who is unwilling to have the Bar conducted upon a high plane and in a businesslike manner, and to completely and thoroughly discharge the duty of the lawyer to the public."

After the adjournment of the luncheon, there was an informal time during which the guests of honor, the speakers, and others greeted each other.

EMMA E. DILLON, Secretary.

Japanese Anticipate President Vanderbilt's Proposal

Editor, AMERICAN BAR ASSOCIATION JOURNAL:

In our esteemed President Vanderbilt's Address at Columbus, printed in the March JOURNAL, he proposes an improvement in the Ashurst Bill (S. 3212) for an Administrative Office of the United States Supreme Court. He proposes (p. 189): "The Bill should go even further in providing for reports. *Every judge should make a quarterly report of the state of his calendar.* . . . If any trial judge shows a case undecided for more than 30 days after its submission, he should be required to file *monthly* reports as to all such cases *until he decides them.* If he continues to be obliged to file such monthly reports for half a year, the Bill should provide that copies of the reports be sent to the Chief Justice . . . for possible action."

This is all to the good. But it is odd that only recently I found a Supreme Court in the Orient making this requirement *two centuries ago.* In the records of the Supreme Court of Japan, in the Tokugawa era (the translation of which I am now editing) I had just come across the following passages:

Instruction from the Supreme Court to the Magistrates, dated 1750: "If a case has been *pending for more than six months,* and has not been disposed of, you are to report in each case *the reason why it has not been disposed of* within the period, stating who is in charge of the case, and that it is still pending before you; and later, when a case so reported is disposed of, you are to report that fact also to us."

Instruction from the Council of State to the Supreme Court, dated 1791: "As regards actions and suits coming before the Full Session of the Chamber of Decisions, [i.e. Supreme Court] and cases to be adjudged by one of the Three Magistrates only and disposed of by summary-trial, it has been customary to send a list of the kinds of cases pending before each one of you *every month* to us. But of late all of you have been very diligent in your duty, and there are *no cases in which tardiness of trial* is to be complained of; so, henceforward, you need not send those lists. . . Henceforth, you are to send a report to us of any action which has been pending for *more than six months,* and also a report of the disposition of [the same] case [when finished],—one report for each case."

JOHN H. WIGMORE.

March 18, 1938.

Linthicum Foundation Prize

THE Faculty of Law of Northwestern University, administering the income of the Charles Clarence Linthicum Foundation, announces that the sum of one thousand dollars and a bronze medal, as a first prize, and not more than five sums of one hundred dollars each, as second prizes with honorable mention, will be awarded to the authors of the best monographs submitted by March 1, 1939, on the following subject "Corporations Doing Business in a Foreign Country: Existing Legal and Administrative Restrictions and Their Policy." For conditions of award and other information, address: The Linthicum Foundation, Northwestern University Law School, 357 East Chicago Ave., Chicago, Ill.

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